Supreme Court, U.S.
FILED

001507 MAR 29 2001

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE, PETITIONER

v.

KEITH MAYDAK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
STUART E. SCHIFFER
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
LEONARD SCHAITMAN
FREDDI LIPSTEIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The Freedom of Information Act, 5 U.S.C. 552 (1994 & Supp. V 1999), exempts from its general disclosure requirement law enforcement records and information the production of which "could reasonably be expected to interfere with [law] enforcement proceedings," 5 U.S.C. 552(b)(7)(A). The questions presented are:

1. Whether, contrary to traditional summary judgment principles, a government motion for summary judgment based on Exemption 7(A)'s broad categorical protection of law enforcement records and information forfeits the government's ability to raise any other, more particularized Freedom of Information Act exemptions, unless the government simultaneously establishes the applicability of each of those other exemptions in a manner that would permit the district court to grant summary judgment on them.

2. Whether, under the Freedom of Information Act, a court may order, as a remedy for the government's failure timely to prove the applicability of other asserted exemptions, the wholesale release of grand jury materials or other information the disclosure of which is separately prohibited by federal law or would directly impair the interests of third parties not before the court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	7
Conclusion	29
Appendix A	1a
Appendix B	19a
Appendix C	24a
Appendix D	25a
Appendix E	26a
Appendix F	31a
Appendix G	50a
Appendix H	53a

TABLE OF AUTHORITIES

Cases:

Barney v. *IRS*, 618 F.2d 1268 (8th Cir. 1980)	9-10
Bevis v. *Department of State*, 801 F.2d 1386 (D.C. Cir. 1986)	11
Byrd v. *Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958)	20
Campbell v. *HHS*, 682 F.2d 256 (D.C. Cir. 1982)	11
Chilivis v. *SEC*, 673 F.2d 1205 (11th Cir. 1982)	10
Curran v. *Department of Justice*, 813 F.2d 473 (1st Cir. 1987)	9
Dickerson v. *Department of Justice*, 992 F.2d 1426 (6th Cir. 1993), cert. denied, 510 U.S. 1109 (1994)	10-11
Douglas Oil Co. v. *Petrol Stops N.W.*, 441 U.S. 211 (1979)	26, 27
FBI v. *Abramson*, 456 U.S. 615 (1982)	12

Cases—Continued: Page

Fiduccia v. *United States Dep't of Justice*, 185 F.3d 1035 (9th Cir. 1999) 28
Firefighters Local Union No. 1784 v. *Stotts*, 467 U.S. 561 (1984) 26
Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 20
Fountain v. *Filson*, 336 U.S. 681 (1949) 19, 20
Fund for Constitutional Gov't v. *National Archives & Records Serv.*, 656 F.2d 856 (D.C. Cir. 1981) 25
GTE Sylvania, Inc. v. *Consumer Union*, 445 U.S. 375 (1980) 27
Illinois v. *Abbott & Assocs.*, 460 U.S. 557 (1983) 26, 27
Ingle v. *Department of Justice*, 698 F.2d 259 (6th Cir. 1983) 28
Irons v. *FBI*, 880 F.2d 1446 (1st Cir. 1989) 27, 28
John Doe Agency v. *John Doe Corp.*, 493 U.S. 146 (1989) 13, 24
Kissinger v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136 (1980) 24
Mapother v. *Department of Justice*, 3 F.3d 1533 (D.C. Cir. 1993) 14
Massey v. *FBI*, 3 F.3d 620 (2d Cir. 1993) 28
NLRB v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) 2, 8, 9, 12, 13, 14, 22, 23
Neely v. *Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967) 20
Renegotiation Bd. v. *Bannercraft Clothing Co.*, 415 U.S. 1 (1974) 25
Senate of P.R. v. *United States Dep't of Justice*, 823 F.2d 574 (D.C. Cir. 1987) 11, 21
Sherman v. *United States Dep't of the Army*, No. 00-20401, 2001 WL 224654 (5th Cir. Mar. 7, 2001) 28
Solar Sources, Inc. v. *United States*, 142 F.3d 1033 (7th Cir. 1998) 9, 10, 15, 16
Southern S.S. Co. v. *NLRB*, 316 U.S. 31 (1942) 26

Cases—Continued: Page

Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 (1984) 25
United States Dep't of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) 13, 28
United States v. *Williams*, 504 U.S. 36 (1992) 26
Vaugh v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) 7
Weinberger v. *Catholic Action of Hawaii*, 454 U.S. 139 (1981) 2
Weisgram v. *Marley Co.*, 528 U.S. 440 (2000) 20

Statutes and rules:

Freedom of Information Act, 5 U.S.C. 552 (1994 & Supp. V 1999) 2, 26a
5 U.S.C. 552(a)(4)(B) (1994 & Supp. V 1999) 12, 25
5 U.S.C. 552(b)(1) 17
5 U.S.C. 552(b)(3) 5, 11, 14, 18, 21, 25, 26a
5 U.S.C. 552(b)(4) 5, 11, 21, 26a
5 U.S.C. 552(b)(5) 5, 11, 14, 26a
5 U.S.C. 552(b)(6) 5, 11, 14, 21, 27, 26a
5 U.S.C. 552(b)(7) 13, 14, 24, 26a
5 U.S.C. 552(b)(7)(A) ..... *passim*
5 U.S.C. 552(b)(7)(C) 5, 11, 14, 21, 27, 28, 26a
5 U.S.C. 552(b)(7)(C)-(F) 5
5 U.S.C. 552(b)(7)(D) 5, 11, 26a
Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207-84 13
Fed. R. Civ. P.:
Rule 56 19
Rule 56(b) 19
Rule 56(c) 18
Rule 56(d) 19
Fed. R. Crim. P.:
Rule 6(e) 2, 5, 25, 27, 27a
Rule 6(e)(2) 25, 27a
Rule 6(e)(3) 25, 28a

In the Supreme Court of the United States

No.

UNITED STATES DEPARTMENT OF JUSTICE, PETITIONER

v.

KEITH MAYDAK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States Department of Justice, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 218 F.3d 760. The opinion of the district court (App., *infra*, 19a-23a) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 18, 2000. A petition for rehearing was denied on October 30, 2000 (App., *infra*, 24a). On January 19, 2001, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to February 27, 2001, and, on February 21, 2001, the Chief Justice further extended the

time for filing a petition to and including March 29, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Freedom of Information Act, as well as Federal Rule of Criminal Procedure 6(e) governing the secrecy of grand jury proceedings, are set forth at App., *infra*, 26a-30a.

STATEMENT

1. Through the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1994 & Supp. V 1999), Congress sought "to balance the public's need for access to official information with the Government's need for confidentiality." *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139, 144 (1981). To that end, FOIA exempts from the government's general duty of disclosure "records or information compiled for law enforcement purposes" if their "production * * could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A). Unlike most of FOIA's exemptions, Exemption 7(A) may be invoked without detailed identification or analysis of the individual documents. Rather, it is a categorical exemption that broadly protects types and classes of documents from disclosure if the government demonstrates that their production reasonably could be expected to hamper civil or criminal enforcement proceedings. See *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 224, 236 (1978). Exemption 7(A)'s limitation on the government's disclosure obligation is temporally limited, however, lasting only as long as a reasonable risk of interference with law enforcement efforts persists.

2. a. In 1994, respondent was convicted on thirteen counts of wire fraud, mail fraud, access device fraud, and money laundering in the Western District of Pennsylvania. He was sentenced to 96 months' imprisonment. See App., *infra*, 2a;

C.A. App. 149.[1] While his direct appeal of his conviction was pending, respondent submitted to the United States Attorney's Office for the Western District of Pennsylvania a FOIA request for copies of "any and all documents which pertain to me, mention me, or list my name." App., *infra*, 2a. The request was referred to the Department of Justice's Executive Office for United States Attorneys for handling, and that Office denied the request under Exemption 7(A). *Ibid.* Throughout a number of appeals to the Department of Justice's Office of Information and Privacy, the government's assertion of Exemption 7(A) was reconsidered and sustained due to the pendency of respondent's and his co-defendant's direct appeals of their convictions and their numerous post-conviction challenges. *Id.* at 3a-4a, 55a-57a.

b. In August 1997, respondent filed suit under FOIA and moved for summary judgment solely on the ground that Exemption 7(A) did not apply because "he had already been convicted." App., *infra*, 4a. The government filed an answer and cross-moved for summary judgment on the ground that Exemption 7(A) barred disclosure, because respondent's post-conviction motions "derived from and were part of the original law enforcement proceedings, and disclosure would interfere with the [Department of Justice's] ability to respond to those motions" or to reprosecute the case if a new trial were ordered. *Ibid.*

A declaration filed in support of the government's summary judgment motion by Paul Hull, the Assistant U.S. Attorney who was handling respondent's ongoing criminal proceedings, chronicled the numerous completed and pending post-conviction challenges filed by respondent and his co-defendant. App., *infra*, 31a-36a. The Hull Declaration explained how the information requested would both "aid

---

[1] Respondent was released from federal prison in February 2001, and is now on supervised release.

[respondent] in crafting responses to the government's positions on issues he raised on appeal" and "would have interfered with prospective law enforcement proceedings if he were granted a re-trial and/or a re-sentencing," *id.* at 39a-40a. The Hull Declaration also explained that "there is a genuine concern about harassment of persons associated with this case" based on "the legal and other difficulties that have befallen persons who have provided information" to the government. *Id.* at 45a; see also *id.* at 51a-52a.

A declaration filed by John Boseker, an Attorney Advisor in the Executive Office of U.S. Attorneys, also explained that the government invoked Exemption 7(A) based on a "continuous and systematic barrage of" challenges to their convictions filed by respondent and his co-defendant. App., *infra*, 60a; see also *id.* at 55a. The Boseker Declaration concluded that no non-public documents could be released "without severely compromising the prosecutorial functions in this complex criminal prosecution." *Id.* at 61a.

The government's summary judgment papers also asserted that numerous FOIA exemptions other than Exemption 7(A) applied to the documents requested by respondent. The Hull Declaration dedicated nearly two single-spaced pages to grouping the requested documents into categories such as grand jury materials; attorney-client and work-product materials (with detailed descriptions of the subcategories of legal research, witness preparation, and strategy development); intra-agency and inter-agency memoranda related to the prosecution of the case; confidential criminal history information obtained from local and state law enforcement agencies; documents provided in confidence to the government by third parties concerning respondent's activities; and confidential financial information provided by third parties. App., *infra*, 36a-39a. In light of that detailed listing, the Hull Declaration stated that the government's reliance on Exemption 7(A) at that stage of the litigation

was not intended to waive any "applicable particularized exemptions to the requested wholesale disclosure requested by [respondent]," and specifically asserted the potential applicability, in addition to FOIA Exemption 7(A), of Exemptions 3, 4, 5, 6, 7(C), and 7(D). *Id.* at 45a. The Boseker Declaration likewise asserted that, in addition to Exemption 7(A), the records and information could be protected by Exemptions 3, 5, 6, and 7(C) through (F). *Id.* at 61a-62a.

Based on those factual submissions concerning other exemptions, the government's memorandum supporting its motion for summary judgment on Exemption 7(A) contained a section headed "Other FOIA Exemptions Preclude Disclosure of the Requested Documents." Gov't Summ. J. Mem. 17. The memorandum stated that the grand jury materials identified in the Hull Declaration "would be exempt from disclosure" under FOIA Exemption 3 and Federal Rule of Criminal Procedure 6(e). Gov't Summ. J. Mem. 18; see also Gov't Reply Mem. 16-17. The reply memorandum likewise stated that the materials identified in the Hull Declaration as implicating privacy concerns would fall within Exemption 7(C). See Gov't Reply Mem. 16. The summary judgment papers went through the same analysis for the attorney-client and work-product privileged materials identified in the Hull Declaration, noting that they were protected from disclosure under Exemption 5. *Ibid.*; Gov't Summ. J. Mem. 5, 18.[2]

---

[2] The papers also identified as information derived "from confidential sources" (Gov't Summ. J. Mem. 19), and thus protected by Exemption 7(D), the "confidential criminal history information and reports obtained from local and state law enforcement organizations during the course of this prosecution," "documents that were provided in confidence by third parties to advise the government of ongoing matters involving [respondent]," and "confidential documents that were furnished by a third party to provide financial information" discussed in the Hull Declaration (App., *infra*, 38a).

c. The district court denied respondent's motion for summary judgment and granted the government's cross-motion for summary judgment on the ground that the documents were properly withheld under Exemption 7(A). App., *infra*, 19a-23a. The court concluded that the release of the documents could reasonably be expected to interfere with enforcement proceedings because, if respondent's appeals or post-conviction motions resulted in a new trial, respondent would gain the benefit of the government's work product. *Id.* at 22a. Because the district court concluded that Exemption 7(A) covered all of the documents requested by respondent, the court did not address the other exemptions identified by the government.

3. Respondent appealed. Before the completion of briefing, the Department of Justice determined that, in light of the Third Circuit's most recent rejection of respondent's appeals and the remote likelihood that any of his remaining challenges would succeed, the production of requested documents no longer posed a reasonable risk of interfering with enforcement proceedings. See App., *infra*, 6a-7a, 15a. The Department accordingly withdrew its reliance on Exemption 7(A) and requested that the court of appeals remand the case to permit the Department to review the applicability of the order exemptions identified in its summary judgment papers and to permit the district court to rule on them.[3]

The court of appeals denied the motion to remand and ordered full disclosure of all requested documents without consideration of the applicability of any other exemptions. App., *infra*, 1a-18a. The court agreed that the government properly "grouped the requested records into categories and offered generic reasons for withholding the documents in each[,]" because "[i]t is well established that the government

---

[3] In light of its follow-up review, the Department subsequently released approximately 2600 pages of material to respondent.

can satisfy its burden of proof under Exemption 7(A) by utilizing this format." *Id.* at 5a. The court nevertheless invoked what it stated to be a "general rule" that the government must "assert all [applicable] exemptions at the same time, in the original district court proceedings." *Id.* at 7a. In the court's view, the government had waived its right to assert other exemptions in this case because, while identifying and discussing them in its papers, the government had not "substantiate[d]" them "in such a manner that the district court [could] rule on the issue." *Id.* at 9a.

In response to the government's concern that full substantiation of the other exemptions during the pendency of enforcement proceedings would "disclose the very information that the more generalized categorical showing required for Exemption 7(A) was designed to protect," the court expressed the view that a *Vaughn* index[4] would not necessarily be required, particularly where grand jury or attorney work-product materials were sought. App., *infra*, 11a, 13a. The court also reasoned that "the government has mechanisms by which it can accomplish the goal of protecting sensitive information while * * * satisfying its burden of proof," such as through the increased use of *in camera* proceedings. *Id.* at 13a.

The court subsequently denied the government's petition for rehearing and suggestion for rehearing en banc. App., *infra*, 24a-25a. The court has stayed its mandate pending this Court's disposition of the instant petition.

REASONS FOR GRANTING THE PETITION

The court of appeals has prescribed a procedure for litigating FOIA claims that strips Exemption 7(A) of much of its value. While it permits the government to invoke

---

[4] See *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

Exemption 7(A) in general categorical terms, in order to avoid compromising an investigation by the very act of claiming the exemption, the court's newly announced procedure requires the government at the same time to make the very line-by-line and page-by-page showings not required for Exemption 7(A), in order to preserve other important exemptions for use when the protection of Exemption 7(A) expires. The court of appeals' decision departs from the practice of other circuits and conflicts with decisions of this Court governing FOIA litigation specifically and summary judgment principles generally. Moreover, the court of appeals has prescribed an unworkable procedure that has already begun to interfere with pending enforcement proceedings and that, at best, will impose unwarranted litigation burdens on the federal government and district courts, needlessly prolong FOIA litigation, and increase the use of *in camera* proceedings. Finally, even if the new procedure were appropriate on a prospective basis, nothing in FOIA permits courts to remedy perceived litigation missteps by the government by ordering the wholesale release of documents that are independently protected from disclosure by other federal laws (such as the court's unprecedented release of more than one thousand pages of grand jury materials here) or that would reveal private and sensitive information about third parties not before the court. Accordingly, this Court's review is warranted.

1. a. The court of appeals' decision departs from the practice endorsed by this Court and followed in other circuits. In *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), this Court held that the government may invoke FOIA Exemption 7(A) to protect against interference with law enforcement proceedings without making the type of page-by-page or document-by-document showing required to invoke most other FOIA exemptions. Rather, under Exemption 7(A), "certain generic determinations might be

made." *Id.* at 224; see also *id.* at 236 (similar). The Court deemed such an approach necessary to protect against premature disclosure of the government's investigative or litigation strategy and, more particularly, "to prevent harm [to] the Government's case in court," *id.* at 224 (internal quotation marks omitted); to prevent litigants from obtaining "earlier and greater access" to government investigatory files than they "would otherwise have," *id.* at 241; to protect prospective witnesses and those cooperating with the government from harassment and intimidation, *id.* at 239-240; and to ensure that "advance access" would not permit a defendant to "construct defenses" to the government's enforcement efforts, *id.* at 241.

In light of this Court's decision in *Robbins Tire* and its recognition of the important and unique manner in which Exemption 7(A) must operate, other circuits have recognized that Exemption 7(A) litigation cannot be saddled with the types of individualized withholding justifications required by the court of appeals here, lest the government's effort to meet its burden under FOIA "prematurely * * * let the cat out of the investigative bag." *Curran* v. *Department of Justice*, 813 F.2d 473, 475 (1st Cir. 1987). "[I]n the environs of Exemption 7(A)," the First Circuit explained, requiring *Vaughn* indices from the government

> is simply not a practicable approach. Provision of the detail which a satisfactory *Vaughn* Index entails would itself probably breach the dike. In such straitened circumstances, the harm which the exemption was crafted to prevent would be brought about in the course of obtaining the exemption's shelter. The cure should not itself become the carrier of the disease.

Ibid.; see also *Solar Sources, Inc.* v. *United States*, 142 F.3d 1033, 1040 (7th Cir 1998) (including a "*Vaughn* index requirement in a 7(A) case would make little sense"); *Barney* v.

IRS, 618 F.2d 1268, 1272-1274 (8th Cir. 1980) (per curiam) (declining to require individualized justifications for withholding in Exemption 7(A) case).

For those same reasons, when Exemption 7(A) becomes inapplicable because the enforcement proceedings have concluded—or, as in this case, the agency has determined that production of the documents no longer could reasonably be expected to interfere with enforcement proceedings—other courts have permitted the agency to invoke other relevant exemptions through the traditional individualized review process. In *Chilivis* v. *SEC*, 673 F.2d 1205 (1982), for example, the Eleventh Circuit allowed the government to assert and substantiate specific exemptions for the first time after the law-enforcement investigations supporting the original invocation of Exemption 7(A) were completed. *Id.* at 1209. In language that contrasts sharply with the D.C. Circuit's decision here, the Eleventh Circuit held that the SEC "had no obligation to raise all applicable affirmative defenses in its motion to dismiss and/or motion for summary judgment" and thus that "the failure to include all relevant exemptions * * * did not result in waiver." *Ibid.* Thus, had the present case been litigated in the Eleventh Circuit rather than the D.C. Circuit, the government would have remained able to protect grand jury materials and other matters from disclosure after Exemption 7(A)'s protection lapsed. See also *Solar Sources*, 142 F.3d at 1036 n.2 (Seventh Circuit notes, without criticism, that the government "reserved the right to assert" other exemptions "if the district court rejected its 7(A) exemption claim"); *Dickerson* v. *Department of Justice*, 992 F.2d 1426, 1430 n.4 (6th Cir. 1993) (noting that, "[e]ven where exemption (7)(A) has become inapplicable," other exemptions may apply, but the district court and court of appeals could properly limit their analysis to Exemption 7(A) and not address other exemptions in advance of 7(A)'s expiration), cert. denied, 510

U.S. 1109 (1994); *id.* at 1434 (Beckwith, J., concurring) (court "properly confined" its analysis to the 7(A) claim).[5]

The court of appeals' decision here imposes on the government the very litigation burden rejected by other courts of appeals. While the court of appeals did not require the use of *Vaughn* indices to invoke Exemption 7(A) itself, the court's ruling has the same effect because it requires the government, at the same time it invokes Exemption 7(A)'s categorical protection, to make an individualized showing for every document falling within 7(A) if it wishes to preserve its ability to invoke other exemptions once the threat to enforcement proceedings abates. Given the nature and scope of Exemption 7(A)'s temporally limited coverage, the simultaneous preservation of other exemptions is critical because enforcement proceedings almost invariably produce such sensitive and confidential matters as pre-decisional agency memoranda, work product, and attorney-client communications (Exemption 5); personal and private details about individuals (Exemptions 6 and 7(C)); grand jury materials (Exemption 3); or the identities of and information supplied by confidential sources and informants (Exemption 7(D)). Investigations of white-collar crimes also frequently involve, as in this case, the provision of confidential and sensitive financial information by third parties (Exemption 4). Unlike the approach taken by other circuits, the D.C. Circuit's decision in this case forces the government to choose between invoking Exemption 7(A)'s protection for its ongoing law enforcement efforts, which can be obtained on a categorical basis but may have a limited duration, or making the individualized showing necessary to preserve those other

---

[5] Prior to its decision here, the D.C. Circuit had taken a similar approach. See *Senate of Puerto Rico* v. *United States Dep't of Justice*, 823 F.2d 574, 580-581 (1987); *Bevis* v. *Department of State*, 801 F.2d 1386, 1390 (D.C. Cir. 1986); *Campbell* v. *HHS*, 682 F.2d 256, 265-266 & n.22 (1982).

vital exemptions for the future at the risk (as this Court warned in *Robbins Tire*) of prematurely disclosing the government's investigative hand.[6]

This Court's review is further warranted because universal venue lies in the District of Columbia for FOIA actions. 5 U.S.C. 552(a)(4)(B) (1994 & Supp. V 1999). Criminal defendants, incarcerated prisoners, and all others who seek sensitive law enforcement records traditionally protected by Exemption 7(A) thus will be able to avoid the protection afforded the government by the practice in other circuits simply by choosing to file suit in the District of Columbia.

b. The court of appeals' decision cannot be reconciled with this Court's decision in *NLRB* v. *Robbins Tire & Rubber Co.*, *supra*. Contrary to the court of appeals' insistence that there is nothing "unique" about the government's burden of proof in Exemption 7(A) cases (App., *infra*, 11a), the entire thrust of this Court's decision in *Robbins Tire* is that the traditional detailed showing required to invoke most other FOIA exemptions does not and could not practicably apply in Exemption 7(A) cases. Rather, the Court concluded that the "literal language" (437 U.S. at 223) of Exemption 7(A) carves it out for distinctive treatment:

> There is a readily apparent difference between [FOIA] subdivision (A) and subdivisions (B), (C), and (D). The latter subdivisions refer to particular cases—"a person," "an unwarranted invasion," "a confidential source"—and thus seem to require a showing that the factors made relevant by the statute are present in each distinct situation. By contrast, since subdivision (A) speaks in

---

[6] Congress was aware that nearly half of the FOIA requests received by at least one federal law enforcement agency "come from convicted felons, many of whom are seeking information with which to identify the informants who helped to convict them." *FBI* v. *Abramson*, 456 U.S. 615, 628 n.12 (1982).

> the plural voice about "enforcement proceedings," it appears to contemplate that certain generic determinations might be made.

Id. at 223-224; see also *id.* at 234. Nor, the Court explained, could the primary purpose of Exemption 7(A)—protecting against premature disclosure of the government's investigative and litigation strategies and witness identities—be accomplished if such detailed showings were required whenever Exemption 7(A) is invoked. *Id.* at 224-234. Indeed, the legislative history characterized as "ludicrous" the concern that the government would have to demonstrate particularized and specific harm for each document involved in a law enforcement proceeding. *Id.* at 235. Yet the court of appeals has done just that: its requirement that the applicability of all other exemptions implicated by Exemption 7(A) materials be comprehensively proven simultaneously with the assertion of Exemption 7(A) imposes the very litigation paradigm rejected by Congress and by this Court in *Robbins Tire.*[7]

Although this Court has made clear that FOIA's statutory exemptions must be given "meaningful reach and application," *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989), the court of appeals' ruling in this case greatly

---

[7] Contrary to the court's characterization of Exemption 7(A) as "simply one exception on a list of many" (App., *infra*, 11a), Congress's amendment of that exemption in 1986 evidences its singular sensitivity to ensuring that FOIA requests not impede law enforcement efforts. In that year, Congress lowered the threshold risk of interference from "would" interfere with enforcement proceedings to "could reasonably be expected to." See Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, § 1802, 100 Stat. 3207-84 (5 U.S.C. 552(b)(7)). That amendment was designed "to give the Government greater flexibility in responding to FOIA requests for law enforcement records or information." *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 777-778 n.22 (1989).

undermines the protection afforded by Exemption 7(A). The *Robbins Tire* holding that Exemption 7(A) can, and often must, be substantiated by categorical descriptions of material to protect legitimate law enforcement interests is fundamentally incompatible with the court of appeals' holding that an agency, at the same time it invokes Exemption 7(A), always can and must process an entire law-enforcement file, make redactions and individualized exemption decisions, and justify each redaction or exemption under specific exemptions without risking disclosure that would result in the very interference with law enforcement that Exemption 7(A) was designed to avert. Because virtually every law enforcement proceeding will produce records that fall within other FOIA exemptions, the court of appeals has emptied Exemption 7(A)'s categorical protection of much of its practical import.[8]

The court of appeals' decision also pays scant heed to this Court's admonition in *Robbins Tire* that, unlike other FOIA exemptions that focus on the harm caused by the "disclosure" of information (see, *e.g.*, 5 U.S.C. 552(b)(3) and (6)), Exemption 7 requires courts "to look at the interference that

---

[8] Occasionally, the government finds it appropriate to assert other exemptions along with Exemption 7(A)—if, for example, Exemption 7(A) does not cover the entire request or, due to particular circumstances, the alternative exemptions can safely be justified on a categorical basis. See, *e.g.*, *Mapother* v. *Department of Justice*, 3 F.3d 1533 (D.C. Cir. 1993) (cited at App., *infra*, 11a) (government asserted Exemption 5, which covered most of the report in question, as well as Exemptions 7(A) and 7(C), because those exemptions could be asserted categorically without revealing specific evidence the government had or disclosing personal information about individuals). The court of appeals erred, however, in concluding (App., *infra*, 11a) that the fact that the government has occasionally been able to address additional exemptions in an Exemption 7(A) case means that it can always do so. Quite the opposite, such cases evidence the need for retaining flexibility and discretion in the district court to manage Exemption 7(A) litigation, rather than imposing the rigid and unyielding litigation regimen prescribed by the court of appeals here.

would flow from the 'production,' and not merely the disclosure, of records." 437 U.S. at 238 n.18. The categorical approach prescribed by this Court in *Robbins Tire* thus protects against not only the premature disclosure of sensitive law enforcement information, but also the diversion of law enforcement records, files, and resources from investigation and litigation to FOIA processing.

The document review necessary to categorize information and records for a categorical invocation of Exemption 7(A) can generally be accomplished relatively quickly and efficiently, with little disruption to the field offices where investigations or litigation is pending. By contrast, a full-scale, page-by-page analysis of every document in a law enforcement file for purposes of substantiating all other potential exemptions "in such a manner that the district court can rule on" their applicability (App., *infra*, 9a) would require the lengthy diversion of active law enforcement files and would entail an enormous intrusion on the time and resources of agents and prosecutors.[9] The result would be to divert investigators and prosecutors from their primary role of law enforcement to FOIA processing, and to deprive field offices of the files necessary to continue the investigation or prepare for trial, thereby further complicating and potentially impairing the law enforcement process.

To illustrate, in *Solar Sources, Inc.* v. *United States*, *supra*, two corporations filed a FOIA request for the Antitrust Division's files of its large-scale investigation into a price-fixing conspiracy in the explosives industry. 142 F.3d at 1035. The Justice Department identified more than 5,000,000 pages of documents and more than 70 million bytes of computerized data responsive to the request. *Id.* at 1037.

---

[9] The FBI, U.S. Attorney's Offices, and the Postal Service require the records to be sent from the field office to central headquarters for such FOIA processing.

Due to the pendency of its criminal investigation, the Department invoked Exemption 7(A) and withheld all nonpublic information related to its ongoing investigation. Unlike the D.C. Circuit in this case, the district court in *Solar Sources*, in a ruling not questioned by the Seventh Circuit, permitted the Department to reserve its right to assert other exemptions if the Exemption 7(A) claim failed. See *id.* at 1036 n.2. If that case had arisen in the D.C. Circuit after the court below rendered its decision, however, the government would have been forced to delay both its enforcement proceedings and the FOIA litigation for years while it processed each of the 5,000,000 pages and 70 million bytes of electronic data to identify specific applicable exemptions and appropriate redactions. See *id.* at 1039 (noting that "it would require eight work-years" to review all of the documents in the investigatory file individually). And all that additional effort would have been for naught, because—as is not uncommon in Exemption 7(A) cases—the corporations, we have been informed, ceased to pursue their FOIA requests once the enforcement proceedings terminated, thereby obviating any need for the courts to address the alternative exemptions.[10]

Nor is the harm worked by the D.C. Circuit's decision hypothetical. The FBI has received from an individual convicted in the World Trade Center bombing a FOIA request for all records pertaining to himself. *Nidal A. Ayyad* v. *Department of Justice*, Civil Action No. 00-Civ. 960-KTD (S.D.N.Y.). To date, the FBI has identified more than 5,000 pages of responsive material. To guard against possible

---

[10] We have been informed by the Office of Information and Privacy that, in the Justice Department's experience, roughly half of all FOIA claimants seeking law enforcement records abandon their requests once the underlying enforcement proceedings terminate, making it unnecessary to address alternative exemption claims.

application of the rule announced by the court of appeals in this case, the FBI diverted personnel from other pending matters to undertake an extraordinary page-by-page review of the documents for all applicable exemptions. Moreover, substantiating specific redactions so that a court can rule on them could reveal to other suspects what evidence the government has (or does not have), and the scope and direction of its investigation, creating the potential for those suspects to tamper with or destroy evidence and otherwise frustrate enforcement proceedings. Analogous concerns have now arisen with respect to a FOIA request for information pertaining to the Oklahoma City bombing investigation. *Hoffman* v. *FBI*, Civil Action No. 98-CIV-1733 (W.D. Okla.).

In another case involving a pending deportation proceeding against an individual believed to be associated with the Palestinian Islamic Jihad, a terrorist organization, the deportee has filed a FOIA request for his file, a substantial portion of which is classified. Notwithstanding the pendency of the enforcement proceeding, following the court of appeals' decision here, the district court ordered the government to file a *Vaughn* index. *Najjar* v. *Ashcroft*, Civil Action No. 1:00-CV-01472 (RCL) (D.D.C.). To ensure that the government does not waive its right to protect classified information under FOIA Exemption 1, the Justice Department is now reviewing all the records page-by-page and preparing a *Vaughn* index that not only justifies, in categorical terms, the invocation of Exemption 7(A) for the entire file, but also sufficiently substantiates the Exemption 1 claim and all other applicable exemptions so that the district court can rule on them. This exercise is complicating the enforcement proceeding and risks disclosing detailed information that would help the deportee frustrate the government's case. It may also ultimately be a waste of resources because, if the deportation is successful, the deportee may decide that

he no longer desires the records, making it unnecessary for the court to address the other exemptions.[11]

c. The court of appeals' decision also departs from traditional summary judgment principles established by this Court. Before the district court, respondent moved for summary judgment on the applicability of Exemption 7(A). The government cross-moved for summary judgment on Exemption 7(A), because its broad and categorical coverage was most conducive to a prompt, efficient, and comprehensive resolution of the claims in respondent's complaint. The government's papers also asserted the applicability of numerous other exemptions. In our view, the government's papers supported summary judgment on some of those other exemptions, such as Exemption 3's categorical protection of grand jury materials. But even if the court could not have granted summary judgment on all the exemptions invoked, at a minimum, the government's papers raised a genuine issue of material fact concerning the releasability of the documents, and thereby precluded the grant of summary judgment and wholesale disclosure of documents to respondent. See Fed. R. Civ. P. 56(c).

On appeal, however, the court of appeals not only reversed the district court's grant of summary judgment on Exemption 7(A), it also proceeded to grant respondent summary judgment on all other potential exemptions, notwithstanding the genuine issues of material fact identified by the government. The court deemed that extraordinary disposition to be justified because the government, in moving for summary judgment on a single, dispositive exemption, had not simultaneously presented for summary judgment the

---

[11] As these cases demonstrate, the court of appeals' ruling affords the targets of federal law enforcement investigations every incentive to file FOIA requests for information about their cases, if only to distract, delay, or impede the government's enforcement efforts.

applicability of all other relevant exemptions. See App., *infra*, 7a-18a. Nothing in either Rule 56 of the Federal Rules of Civil Procedure or FOIA requires such an all-or-nothing approach. To the contrary, Rule 56 expressly contemplates motions for summary judgment that encompass less than all the potential claims at issue in the litigation. See Fed. R. Civ. P. 56(b) and (d). It is, in fact, common in civil litigation for a party to seek partial or complete summary judgment on a dispositive affirmative defense, while reserving defenses that offer less relief or that would require additional discovery or detailed proof. Indeed, it makes eminent sense, from a time and resource perspective, for courts and litigants to address globally dispositive issues first if possible, rather than spend months or years litigating theories that may never need to be reached in the litigation.

The court of appeals' outright grant of summary judgment to respondent in these circumstances cannot be reconciled with this Court's precedents. In *Fountain* v. *Filson*, 336 U.S. 681 (1949), the district court granted summary judgment to Fountain on the basis of a single, dispositive legal issue. The court of appeals not only reversed that legal ruling, but also granted summary judgment for Filson on the basis of another issue that had not yet been litigated below. This Court reversed, emphasizing that summary judgment is appropriate only if no genuine issues of material fact exist (*id.* at 683), and holding that the court of appeals erred in ordering summary judgment on the basis of a legal claim that was not addressed by the district court (*ibid.*). That approach, the Court explained, impermissibly short-circuited Fountain's opportunity to demonstrate disputed questions of fact on the new issue. *Ibid.* Likewise here, "[w]hen the Court of Appeals concluded that the trial court should have considered" the other exemptions, "it was error for it to deprive [the government] of an opportunity to dispute the

facts material to that claim by ordering summary judgment against [it]." *Ibid.*

Similarly, in *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963), this Court rejected the argument that, upon reversing a judgment in favor of the appellees, it could proceed to grant judgment for the appellants on an alternative legal ground that had not been addressed by the district court. Instead, the Court held that the appropriate course of action was to remand for consideration of the remaining claim rather than "to deny the appellees their day in court as to a disputed part of the case on which the trial court has never ruled because its view of the law evidently made such a ruling unnecessary." *Id.* at 156.[12]

The court of appeals premised its contrary judgment on what it stated to be a "general rule" in FOIA cases that the government "must assert all exemptions at the same time, in the original district court proceedings." App., *infra*, 7a. Whatever the validity of that "general rule" in light of the summary judgment principles discussed above, the government clearly did assert the applicability of other exemptions here. The district court and respondent were fully aware that the government considered numerous other exemptions to be applicable. The declarations and summary judgment papers not only gave fair notice of the government's additional affirmative defenses, they also provided a substantial basis for evaluating the exemptions' potential applicability. Indeed, the district court's opinion opens by referencing the

---

[12] See also *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 325 (1967); *Byrd* v. *Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 533 (1958); cf. *Weisgram* v. *Marley Co.*, 528 U.S. 440, 444 (2000) (court of appeals may enter final judgment in favor of an appellant only where the "loser on appeal" already "has had a full and fair opportunity to present the case").

government's "claimed exemptions." App., *infra*, 20a (emphasis added).[13]

Thus, this is not a case in which the government raised its exemption claims piecemeal at different stages of the district court proceedings, invoked an entirely new exemption for the first time on appeal, or "with[held] its most powerful cannon until after the District Court has decided the case and then spr[ang] it on surprised opponents and the judge." *Senate of Puerto Rico* v. *United States Dep't of Justice*, 823 F.2d 574, 580 (D.C. Cir. 1987) (internal quotation marks omitted). Furthermore, the court's concerns about piecemeal invocation of FOIA exemptions can be and have been adequately policed by preserving the trial court's and parties' traditional discretion and flexibility to structure pleadings and motions practice in the manner most consonant with fairness and efficiency, in light of the particular circumstances presented by a case.

d. The court of appeals' abandonment of the traditional protections afforded Exemption 7(A) claims and sharp departure from ordinary summary judgment procedures raise issues of substantial and continuing importance to the United States. As discussed at pages 8-14, *supra*, the court of appeals' decision will directly impair the government's ability to preserve the confidentiality of law enforcement information and records because it will force upon the government, at the behest of any criminal defendant or incarcerated prisoner, the Hobson's Choice of either providing the type of detailed and individualized document analyses that

---

[13] Given the summary judgment record, the court of appeals' plainly erred in characterizing the government's invocation of other exemptions—and in particular Exemption 3 for grand jury materials—as "cursory, equivocal, and inconsistent" (App., *infra*, 9a). The court failed to understand both that some exemptions can overlap in coverage (such as Exemptions 4, 6, and 7(C)) and that the relevance of particular exemptions can change as enforcement proceedings progress and terminate.

Congress specifically designed Exemption 7(A) to avoid (see *Robbins Tire*, *supra*), or invoking Exemption 7(A)'s categorical protection but forfeiting the right to raise most other exemptions if and when 7(A)'s protection expires. In addition, as discussed at pages 14-18, *supra*, the production of records and information necessary to comply with the court of appeals' newly minted FOIA procedures already has impeded and will continue to impair ongoing law enforcement efforts through the diversion of active records and files, as well as investigatorial and prosecutorial resources, from law enforcement to FOIA processing.

For all of its attendant law-enforcement costs, the FOIA litigation framework prescribed by the court of appeals would do little to improve the efficiency of FOIA litigation in the federal courts. To the contrary, the court's decision would, in most cases, delay FOIA litigation and impose unwarranted litigation burdens on the government and district courts. That is because, under the court of appeals' approach, the government in FOIA cases may no longer proceed like an ordinary civil litigant and seek to dispose of litigation quickly and efficiently by litigating at the outset a single, comprehensive defense. Instead, a prompt and sensible disposition of the case now must be put on hold while the detail-intensive assertion of every single exemption the government wishes to raise is fully and comprehensively explored and litigated so that "the district court can rule on the issue[s]" (App., *infra*, 9a).

That process, moreover, is likely to take longer than usual as the government seeks to "substantiate" its claims to a sufficient extent that the district court could make a final ruling on them (even though the district court might well find it unnecessary to do so), without revealing any of the law enforcement matters, strategies, or processes protected by Exemption 7(A). Indeed, it is telling that, while imposing those new procedural requirements on the government, the

court of appeals was unable to offer any guidance on how the government was to perform that balancing act. While the court purported to identify some measures that the government need *not* take to meet its burden of proof—such as routinely submitting full *Vaughn* indexes (App., *infra*, 11a, 13a)—the court did not identify anything the government *could* do to substantiate its FOIA exemptions without forfeiting the benefits of Exemption 7(A)'s categorical protection, other than suggesting the very detailed affidavits that *Robbins Tire* eschewed or increasing *in camera* submissions (*id.* at 13a).

Further, the court of appeals' approach appears unlikely to promote judicial efficiency. After the government spends weeks, months, or longer substantiating all of its claimed FOIA exemptions, the district court generally still could be expected, when possible, simply to rule on the one comprehensive and dispositive exemption. If that ruling were in favor of the government, the court would likely see little purpose to rendering advisory rulings on the remaining exemptions. However, if that ruling were reversed on appeal, the case would then have to be remanded for the district court to rule on the remaining exemptions—which is precisely the procedural outcome the court of appeals sought to avoid here.

The only way the court's rule would minimize the back-and-forth between the district court and the court of appeals is if it not only obligated the government to prove all of its exemption claims at the outset, but also required the district court to rule on each of those claims, even if it found one of them sufficient to justify the agency withholding. That, however, would work a profound incursion on the traditional discretion of courts to manage litigation and to avoid advisory rulings. See, *e.g.*, *Robbins Tire*, 437 U.S. at 219 n.4 (declining to address additional claimed exemptions when the withholding was sustained under Exemption 7(A)).

Furthermore, such a rule would require the litigation of other FOIA exemptions in an artificial context because the litigation would be constrained by the need to avoid tipping the government's law-enforcement hand at that sensitive stage. As the court of appeals recognized (App., *infra*, 13a), the use of *in camera* submissions would increase significantly when, for example, the government could not even publicly acknowledge the existence of particular aspects of an investigation, a grand jury's operation, wiretaps, confidential sources, or the cooperation of other governments. Affidavits and *Vaughn* indices would have to be diluted, as the court also seemed to acknowledge (*id.* at 11a-13a). The court's decision thus does little to advance the interests of FOIA plaintiffs, the courts, or the public. See *John Doe Agency*, 493 U.S. at 157 (Exemption 7 "is not to be construed in a nonfunctional way"; rather, courts should take a "practical approach" and seek "a workable balance" in FOIA's operation).

2. The court of appeals' unprecedented disclosure of grand jury materials and records containing confidential, personal information about third parties conflicts with decisions of this Court and of other circuits.

a. Courts in FOIA actions have jurisdiction to order the disclosure of agency records only when they have been shown to be "(1) improperly; (2) withheld." *Kissinger* v. *Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) (internal quotation marks omitted). A court accordingly may order the release of records only after it has determined that they were wrongfully withheld. By the same token, courts have no authority to order the release of records that are properly and lawfully withheld from disclosure simply to punish the government for perceived litigation missteps.

Yet that is precisely what the court of appeals did here in ordering the wholesale release of grand jury materials that

are unquestionably protected from disclosure under Exemption 3 and Federal Rule of Criminal Procedure 6(e).[14] The court of appeals did not hold that the grand jury materials it ordered released are not properly classified as grand jury materials, nor did the court find that any of the narrow exceptions to the rule of grand jury secrecy applied. See Fed. R. Crim. P. 6(e)(3). The sole justification for the court's order that grand jury materials be disclosed is thus not that they were "improperly withheld" under FOIA, 5 U.S.C. 552(a)(4)(B) (1994 & Supp. V 1999), but that the exemption claim was improperly litigated. We are aware of no other appellate decision in the 33-year history of FOIA that has ordered the release of grand jury materials that were otherwise protected by Rule 6(e).

In addition to FOIA's own limitations on what records courts may compel an agency to release, this Court has made clear that the federal courts' traditional equitable powersdo not extend to ordering violations of federal law.[15] See *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984) (reversing court of appeals' remedial order that exceeded the limits imposed by federal law and ordered the NLRB to take action beyond its

---

[14] Exemption 3 protects from disclosure information that is "specifically exempted from disclosure by statute." 5 U.S.C. 552(b)(3). Federal Rule of Criminal Procedure 6(e)(2) provides, in pertinent part:

> A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or [other government personnel to whom disclosure is authorized] shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.

Congress has enacted Rule 6(e) into positive law. See *Fund for Constitutional Gov't* v. *National Archives & Records Serv.*, 656 F.2d 856, 869 (D.C. Cir. 1981).

[15] See *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 20 (1974) (courts in FOIA cases may exercise "the inherent powers of an equity court").

statutory powers); *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 576 n.9 (1984) (terms of a consent decree may not conflict with statutory law). Nothing in FOIA commissions a court to effectuate the Act's policies "so single-mindedly that it may wholly ignore other and equally important Congressional objectives"; rather, courts should accommodate "one statutory scheme to another." *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 47 (1942).

b. The compelled release of grand jury materials also ignores the court's independent obligation to protect the secrecy of grand jury materials. For centuries, a critical aspect of the grand jury process has been the secrecy of its proceedings:

> [M]any prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be [a] risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Douglas Oil Co. v. *Petrol Stops N.W.*, 441 U.S. 211, 219 (1979). Grand jury secrecy, accordingly, is "an integral part of our criminal justice system." *Illinois* v. *Abbott & Assocs.*, 460 U.S. 557, 566 n.11 (1983) (quoting *Douglas Oil*, 441 U.S. at 218 n.9).

Because the grand jury "is a constitutional fixture in its own right," *United States* v. *Williams*, 504 U.S. 36, 47 (1992) (internal quotation marks omitted), the courts have an obligation independent from that of the Executive Branch to

protect information that would reveal grand jury proceedings. *Abbott*, 460 U.S. at 564 n.8 ("It is the duty of the court in following 6(e) to protect from public scrutiny and injury such individuals and corporations."). This duty includes protecting not just the grand jury materials at issue in a given case, but the sanctity of the entire grand jury process: "courts [should] consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries." *Douglas Oil*, 441 U.S. at 222. Adherence to that duty is particularly important when, as here, the court ordering disclosure is not the court that convened the grand jury. See *id.* at 225-226, 228.

The rule of grand jury secrecy "is so important, and so deeply rooted in our traditions" as to preclude any "infer[ence] that Congress" authorized the court of appeals to disclose grand jury materials as a sanction for Executive Branch litigation errors without Congress "affirmatively expressing its intent to do so." *Abbott*, 460 U.S. at 572-573. See also *GTE Sylvania, Inc.* v. *Consumers Union*, 445 U.S. 375, 387 (1980) ("There is nothing in the legislative history to suggest that in adopting the Freedom of Information Act to curb agency discretion to conceal information, Congress intended to require an agency to commit contempt of court in order to release documents.").

c. Lastly, the compelled disclosure of materials that implicate the privacy interests of third parties not before the court, see 5 U.S.C. 552(b)(6) and (7)(C), based solely on the litigation conduct of the federal government is in tension with the decisions of other circuits that have limited the application of a unilateral waiver doctrine to such materials. In *Irons* v. *FBI*, 880 F.2d 1446 (1st Cir. 1989) (en banc) (Breyer, J.), the en banc First Circuit held that the confidentiality expectations of private individuals who provide information to the government in conjunction with a law

enforcement proceeding could be waived only, if at all, jointly by the individual and the federal government. *Id.* at 1452. Likewise, in *Sherman* v. *United States Department of the Army*, No. 00-20401, 2001 WL 224654 (Mar. 7, 2001), the Fifth Circuit recently held that "only the individual whose informational privacy interests are protected by exemption 6 can effect a waiver of those privacy interests * * * [, and thus] we do not accept Sherman's argument that the Army has waived its authority to implement exemption 6." *Id.* at *4. See also *Fiduccia* v. *United States Dep't of Justice*, 185 F.3d 1035, 1047 (9th Cir. 1999) (FBI's publicity about search did not waive individual's Exemption 7(C) privacy interest); *Ingle* v. *Department of Justice*, 698 F.2d 259, 269 (6th Cir. 1983) ("[I]t seems clear that it is properly the right of those sources themselves to waive any protection afforded by cooperating with the FBI and not the role of the FBI to suffer them to do so.") (internal quotation marks omitted); cf. *Massey* v. *FBI*, 3 F.3d 620, 624 (2d Cir. 1993) ("[W]e are not convinced that the doctrine of waiver applies to exemption (b)(7)(C)."). FOIA's purposes are "not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
LEONARD SCHAITMAN
FREDDI LIPSTEIN
Attorneys

MARCH 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 98-5492

KEITH MAYDAK, APPELLANT

v.

UNITED STATES DEPARTMENT OF JUSTICE, APPELLEE

Argued May 3, 2000
Decided July 18, 2000

OPINION

SENTELLE, Circuit Judge:

Keith Maydak seeks the release under the Freedom of Information Act ("FOIA") of copies of law enforcement records compiled by the U.S. Attorney's Office for the Western District of Pennsylvania in connection with his criminal prosecution for various offenses. The government originally denied Maydak's FOIA request by invoking FOIA Exemption 7(A), which permits the withholding of law enforcement records which if produced "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A) (1994). The district court granted summary judgment for the government on that basis, holding that it could withhold the documents. Having now aban-

doned its assertion of Exemption 7(A), however, the Department of Justice ("DOJ") seeks a remand of this case so that it might defend the applicability of other FOIA exemptions. Because the DOJ has failed to explain adequately why it could not have pleaded the other exemptions on which it wished to rely in the original district court proceedings, we deny the motion for remand, reverse the district court's judgment, and order the release of all requested documents to Maydak.

I. Background

Maydak was convicted of wire fraud, mail fraud, access device fraud, and money laundering in the United States District Court for the Western District of Pennsylvania in 1994. He currently remains incarcerated for those crimes. On September 23, 1994, while his appeal from his criminal conviction was pending, Maydak filed with the United States Attorney's Office for the Western District of Pennsylvania a request under FOIA and the Privacy Act, 5 U.S.C. § 552a, for "copies of any and all documents which pertain to me, mention me, or list my name." On October 6, 1994, that request was forwarded to the Executive Office for United States Attorneys ("EOUSA").

On November 15, 1994, the EOUSA by letter denied Maydak's request in full, relying solely on FOIA Exemption 7(A). Exemption 7(A) exempts from FOIA disclosure requirements "records or information compiled for law enforcement purposes . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings. . . ." 5 U.S.C. § 552(b)(7)(A). The principal purpose of Exemption 7(A) is to prevent disclosures which might prematurely reveal the government's cases in court, its evidence and strategies, or the nature, scope, direction,

and focus of its investigations, and thereby enable suspects to establish defenses or fraudulent alibis or to destroy or alter evidence. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 227, 241-42, 98 S. Ct. 2311, 57 L.Ed.2d 159 (1978); *see also* 37A AM. JUR.2D *Freedom of Information Acts* § 303 (1994). Another recognized goal of Exemption 7(A) is to prevent litigants from identifying and intimidating or harassing witnesses. *See Robbins Tire*, 437 U.S. at 239-40, 98 S. Ct. 2311. In its denial letter, the EOUSA stated that "portions of the information" contained in Maydak's file were "being considered in connection with" his pending appeal, and thus that the government was withholding all of the requested documents pursuant to Exemption 7(A). Maydak filed a timely appeal of the EOUSA's denial with the Department of Justice's Office of Information and Privacy ("OIP"). On August 8, 1995, the Third Circuit affirmed Mayak's conviction and sentence. *See United States v. Maydak*, 66 F.3d 313 (3d Cir. 1995) (table). On May 29, 1996, the OIP informed Maydak that it was remanding his FOIA request for reprocessing because the EOUSA had concluded that Exemption 7(A) no longer applied.

On August 23, 1996, Maydak filed in the Western District of Pennsylvania a motion pursuant to 28 U.S.C. § 2255 to vacate his sentence. Maydak had waived his right to counsel at sentencing. In his § 2255 motion, he claimed that the waiver was not voluntary, knowing and intelligent because the court had not first explained to him the consequences of proceeding *pro se*, and thus that he was entitled to a new sentencing. On September 11, 1996, the district court dismissed Maydak's § 2255 motion. In November 1996, Maydak filed a motion in the Third Circuit for a certificate of appealability to challenge that dismissal. On February 7, 1997, EOUSA again denied Maydak's FOIA request on Exemption 7(A) grounds because of the pending § 2255 motion.

Maydak again filed a timely appeal with the OIP. On April 10, 1997, the Third Circuit denied Maydak's motion for a certificate of appealability. And on June 12, 1997, the OIP informed Maydak that it was again remanding his FOIA request for reprocessing because the EOUSA had concluded that Exemption 7(A) no longer applied.

In response to the OIP's July 1997 remand of his FOIA request, on August 13, 1997, Maydak filed a complaint in the United States District Court for the District of Columbia seeking an order requiring the government to provide the records and a list of all documents withheld. In proceedings before the district court, Maydak asserted that the documents he requested were not exempt from disclosure under FOIA Exemption 7(A). Because he had already been convicted, Maydak contended that there were no "enforcement proceedings" pending with which release of the requested documents could interfere. The DOJ maintained that Exemption 7(A) continued to apply because the proceedings addressing Maydak's post-conviction motions (including but not limited to the August 23, 1996, § 2255 motion pending when his FOIA request was reprocessed) derived from and were part of the original law enforcement proceedings, and disclosure would interfere with the DOJ's ability to respond to those motions. The DOJ also argued that, should any of the motions result in the vacating of Maydak's conviction, disclosure of the requested documents could interfere with the government's ability to prosecute him again.

To support its argument that disclosure would interfere with those ongoing proceedings and to satisfy the government's burden of proof in denying a FOIA claim, the DOJ presented declarations from Paul E. Hull, the AUSA in the Western District of Pennsylvania who prosecuted Maydak, and from John F. Boseker, an attorney adviser in the

EOUSA. The declarations grouped the requested records into categories and offered generic reasons for withholding the documents in each. It is well established that the government can satisfy its burden of proof under Exemption 7(A) by utilizing this format. *See, e.g., Robbins Tire*, 437 U.S. at 236, 98 S. Ct. 2311; *Bevis v. Department of State*, 801 F.2d 1386, 1390 (D.C. Cir. 1986); *Crooker v. Bureau of Alcohol, Tobacco and Firearms*, 789 F.2d 64, 66-67 (D.C. Cir. 1986).

While his FOIA case was pending, on September 18, 1997, Maydak filed in the Western District of Pennsylvania a motion for a new trial based on newly discovered evidence pursuant to Federal Rule of Criminal Procedure 33. On March 25, 1998, the district court denied the motion, and Maydak appealed. On May 27, 1999, the Third Circuit affirmed the district court's decision. *See United States v. Maydak*, 182 F.3d 904 (3d Cir. 1999) (table). On September 16, 1999, Maydak filed a petition for a writ of certiorari in the United States Supreme Court, which petition was subsequently denied on November 29, 1999. *See Maydak v. United States*, ___U.S. ___, 120 S. Ct. 556, 145 L.Ed.2d 432 (1999).

Additionally, on October 22, 1997, Maydak filed in the Third Circuit a motion for leave to file another § 2255 petition, seeking to reassert the invalid waiver of counsel at sentencing issue. On November 17, 1997, the Third Circuit denied that motion as well, but stayed its denial pending disposition of another case. The Third Circuit finally disposed of Maydak's motion to file another § 2255 petition on January 11, 2000.

Returning to Maydak's FOIA claim, on September 1, 1998, the district court agreed with the DOJ that the release of the requested documents would interfere with enforcement proceedings in the event that Maydak's pending post-

conviction motions and appeals succeeded. Accordingly, the court held that the government properly withheld the records under Exemption 7(A), and granted summary judgment in favor of the DOJ. Maydak appealed the district court's decision to this court. We appointed an *amicus curiae* ("Amicus") and certified two questions: (1) whether FOIA Exemption 7(A) continues to apply as long as a criminal defendant is pursuing a post-conviction collateral attack on the judgment or sentence entered in a criminal enforcement proceeding to which the withheld records relate; and (2) whether the DOJ, through its submissions below, met its burden of justifying its invocation of Exemption 7(A) to shield all the records it identified as falling within the various record categories, as well as the residual records not specifically categorized.

On June 18, 1999, the DOJ conceded partial error with respect to the second of these issues, allowing specifically that the statement in the Hull declaration that "[m]ost of the documents can be placed into one of the [listed] categories" was inadequate to meet the government's burden under Exemption 7(A) with respect to those documents which had not been categorized. The DOJ requested a remand to the district court so that it might present evidence to justify the withholding of the uncategorized documents.

Subsequently, the DOJ informed Maydak and Amicus on July 30 and August 2, 1999, respectively, that "[d]ue to the change in circumstances regarding a previously pending law enforcement matter in which [Maydak] was involved," the government was abandoning its assertion of Exemption 7(A) with respect to Maydak's FOIA request. On August 6, 1999, Amicus notified the DOJ that Maydak intended to appeal the Third Circuit's May 27, 1999, decision to the Supreme Court, and that his motion for leave to file a second § 2255 petition

was still pending in the Third Circuit. Nevertheless, on August 26, 1999, the DOJ filed with this court a second motion for remand based on changed circumstances, confirming that it had abandoned its reliance on Exemption 7(A) and requesting the opportunity for the EOUSA to reprocess Maydak's FOIA request and determine whether other FOIA exemptions might apply.

On November 23, 1999, we dismissed as moot the government's original motion for remand to review and categorize the documents overlooked in the original proceedings and ordered briefing and oral argument on the DOJ's second motion for remand. A few days prior to oral argument, Amicus notified this court that the EOUSA had released some of the requested materials, but had invoked FOIA Exemptions 2, 3, 5, 7(C), 7(D), and 7(E), 5 U.S.C. § 552(b)(2), (b)(3), (b)(5), (b)(7)(C), (b)(7)(D), and (b)(7)(E) (1994), in withholding 1,524 pages of documents and redacting several of the released documents. Amicus also indicated that the EOUSA refused to release requested documents which originated from other agencies and which the EOUSA had "forwarded" back to them.

II. Analysis

We turn now to the DOJ's motion for remand. The government bears the burden of proving the applicability of any statutory exemption it asserts in denying a FOIA request. We have plainly and repeatedly told the government that, as a general rule, it must assert all exemptions at the same time, in the original district court proceedings. *See Washington Post Co. v. United States Dep't of Health & Human Servs.*, 795 F.2d 205, 208 (D.C. Cir. 1986); *Ryan v. Department of Justice*, 617 F.2d 781, 789, 792 (D.C. Cir. 1980); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 779-80 (D.C. Cir. 1978) (en banc), *overruled on other grounds*

by Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1053 (D.C. Cir. 1981) (en banc). FOIA was enacted to promote honesty and reduce waste in government by exposing an agency's performance of its statutory duties to public scrutiny. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772-73 & n. 20, 109 S. Ct. 1468, 103 L.Ed.2d 774 (1989). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Robbins Tire*, 437 U.S. at 242, 98 S. Ct. 2311. As we have observed in the past, the delay caused by permitting the government to raise its FOIA exemption claims one at a time interferes both with the statutory goals of "efficient, *prompt*, and full disclosure of information," *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 580 (D.C. Cir. 1987) (quoting *Jordan*, 591 F.2d at 755), and with "interests of judicial finality and economy." *Id.* (quoting *Holy Spirit Ass'n v. CIA*, 636 F.2d 838, 846 (D.C. Cir. 1980)). Requiring the simultaneous invocation of exemptions also respects the general principle that appellate courts do not normally consider issues that were neither raised nor decided below. *See Ryan*, 617 F.2d at 789; *Jordan*, 591 F.2d at 779. We note that other circuits also require the government to assert all exemptions in the original district court proceedings. *See, e.g., Crooker v. United States Parole Comm'n*, 760 F.2d 1, 2 (1st Cir. 1985); *Fendler v. United States Parole Comm'n*, 774 F.2d 975, 978 (9th Cir. 1985).

Although not its primary argument here, the DOJ suggests that it adequately raised other FOIA exemptions before the district court. Yet the DOJ acknowledges that it did not "formally" invoke other FOIA exemptions in the original district court proceedings. We have said explicitly in

the past that merely stating that "for example" an exemption might apply is inadequate to raise a FOIA exemption. *See Ryan*, 617 F.2d at 792 n. 38a. Instead the government must assert the exemption in such a manner that the district court can rule on the issue. *See id.* Nevertheless, the DOJ maintains that references to other exemptions made in its motion for summary judgment and in the Hull and Boseker Declarations were adequate to preserve those issues.

A review of the record demonstrates that, while those filings all mentioned the potential applicability of other exemptions, the DOJ has to date made no attempt to substantiate those claims. Nor has the government even been consistent in specifying which other exemptions would apply. Ultimately, after reprocessing Maydak's FOIA request in the days immediately prior to oral argument, the EOUSA withheld requested documents pursuant to Exemptions 2, 3, 5, 7(C), 7(D), and 7(E). In its brief before us, however, the DOJ claimed the applicability of Exemptions 3, 5, 6, 7(C), and 7(D). Meanwhile, the DOJ's motion for summary judgment suggested only Exemptions 3, 5, and 7(D) as possibilities; the Hull Declaration offered that Exemptions 3, 4, 5, 6, 7(C), and 7(D) "may be applicable"; and the Boseker Declaration asserted conclusorily and without elaboration that all the requested records were subject to Exemptions 3, 4, 5, 6, 7(C), 7(D), 7(E), and 7(F). Neither declaration made any attempt to substantiate the applicability of other exemptions, and the DOJ has never, at any time, offered further support for such claims. These cursory, equivocal, and inconsistent assertions are clearly inadequate to the task. The district court had nothing upon which to rule one way or the other with respect to the applicability of other FOIA exemptions. Accordingly, under the standard articulated in *Ryan*, the DOJ did not adequately assert other FOIA exemptions in the proceedings below.

Indeed, unlike in many of the cases it cites as supporting a remand—cases in which the DOJ merely fell short in its good faith attempts to carry its burden of proof with respect to other asserted exemptions, *see, e.g., North v. Walsh*, 881 F.2d 1088, 1100 (D.C. Cir. 1989); *Bevis*, 801 F.2d at 1390—here the DOJ does not even claim that it tried to satisfy that burden. Instead, the DOJ maintains that it should not have to. The DOJ's primary argument before us is that the unique nature of its burden of proof under Exemption 7(A) relieves it of the burden of proving its case with respect to other exemptions it seeks to assert in the original district court proceedings. As noted above, under *Robbins Tire* and its progeny, the DOJ satisfies its burden of proof under Exemption 7(A) by grouping documents in categories and offering generic reasons for withholding the documents in each category. *See, e.g., Robbins Tire*, 437 U.S. at 236, 98 S. Ct. 2311; *Bevis*, 801 F.2d at 1390; *Crooker*, 789 F.2d at 66-67. The DOJ maintains that, if it has to assert other exemptions simultaneously with Exemption 7(A), that it will be forced to produce a *Vaughn* index, *see Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975), to satisfy its burden of proof with respect to the other exemptions. The DOJ contends that the mere act of producing a *Vaughn* index for the purpose of substantiating its invocation of another FOIA exemption will itself disclose the very information that the more generalized categorical showing required for Exemption 7(A) was designed to protect, and thereby undermine the very purposes of Exemption 7(A). To avoid this result, the DOJ seeks a blanket rule that, if the government invokes Exemption 7(A) in the original district court proceedings, then the government does not have to claim the applicability of or satisfy its burden of proof with respect to any other exemption until such time as the government decides that Exemption 7(A) no longer applies or a court tells the government that Exemption 7(A) does not apply. In the DOJ's

view, after the government or the courts conclude that Exemption 7(A) is inapplicable, then the government should be allowed to start back at the beginning in assessing the applicability of and satisfying its burden under other exemptions. We disagree.

First and foremost, the statute says nothing that would indicate that Exemption 7(A) is so unique. *See* 5 U.S.C. § 552(b). Instead, the statute merely lists several exceptions to FOIA's general policy of disclosure of all federal records not otherwise exempt. *See id.* Nothing in the statute, either express or implied, suggests that Exemption 7(A) should be singled out for preferential treatment by the courts. Exemption 7(A) is simply one exception on a list of many. Numerous cases exist in this and other circuits in which the government has asserted Exemption 7(A) and other exemptions at the same time, presumably without the dire consequences the DOJ alleges here. *See, e.g., Manna v. United States Dep't of Justice*, 51 F.3d 1158, 1162 & n. 4 (3d Cir. 1995); *Mapother v. Department of Justice*, 3 F.3d 1533, 1536 (D.C. Cir. 1993).

Moreover, despite the DOJ's concerns, the government does not necessarily have to produce a *Vaughn* index to justify denying a FOIA request under other exemptions, either. Specific holdings of this court and the Supreme Court permit the satisfaction of the government's burden of proof under many of the other exemptions claimed here through generic, categorical showings similar to that for Exemption 7(A). *See, e.g., United States Dep't of Justice v. Landano*, 508 U.S. 165, 179-80, 113 S. Ct. 2014, 124 L.Ed.2d 84 (1993) (discussing circumstances in which the government can substantiate a claim of Exemption 7(D) generically); *Reporters Comm. for Freedom of the Press*, 489 U.S. at 777-80, 109 S. Ct. 1468 (holding that the *Robbins Tire* categorical

approach to Exemption 7(A) is appropriate for Exemption 7(C), and citing *Federal Trade Comm'n v. Grolier Inc.*, 462 U.S. 19, 103 S. Ct. 2209, 76 L.Ed.2d 387 (1983), as establishing the same for Exemption 5); *Church of Scientology v. Internal Revenue Service*, 792 F.2d 146 (D.C. Cir. 1986) (permitting the IRS to support its Exemption 3 claim generically with affidavits instead of a *Vaughn* index). Indeed, in *Church of Scientology*, we recognized that "when . . . a claimed FOIA exemption consists of a generic exclusion, dependent upon the category of records rather than the subject matter which each individual record contains, resort to a *Vaughn* index is futile." *Church of Scientology*, 792 F.2d at 152. To that end, on other occasions, based upon the circumstances at hand, we have upheld the government's assertion of FOIA exemptions other than 7(A) based on something less than a *Vaughn* index. *See, e.g.*, *Brinton v. Department of State*, 636 F.2d 600, 606 (D.C. Cir. 1980) (upholding invocation of Exemption 5 on the basis of affidavits and no *Vaughn* index).

Given the posture of this case, we are in no position to decide whether affidavits alone would have sufficed to substantiate claims of other exemptions by the government here. Nevertheless, some of the categories identified by the Hull Declaration for purposes of Exemption 7(A) are of a nature which would lend themselves to generic and categorical justification under other exemptions. For example, the Hull Declaration identified among the requested documents "grand jury materials," which the DOJ could have claimed were also protected by FOIA Exemption 3 and Federal Rule of Criminal Procedure 6(e); and "attorney client/work product materials," which the government could have asserted fell within FOIA Exemption 5. Yet before us the DOJ concedes that it did not even attempt to substantiate its claims with respect to these other

exemptions. The DOJ's only justification for that failure was its insistence that such assertions would have required it absolutely to produce a *Vaughn* index, an excuse plainly contradicted by the above-mentioned precedents.

The DOJ may be correct that, in some cases, a *Vaughn* index could disclose too much and undermine these goals, particularly where trial or equivalent administrative hearing has not yet occurred. *See Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1040 (7th Cir. 1998) (recognizing this concern); *Curran v. Department of Justice*, 813 F.2d 473, 475 (1st Cir. 1987) (same). In fact, the same could be said with respect to other exemptions as well. *See Hayden v. National Sec. Agency*, 608 F.2d 1381, 1384-85, 1390 (D.C. Cir. 1979) (acknowledging similar objections with respect to substantiating withholding under Exemptions 1 and 3). And in FOIA cases, there is always the possibility that the district court may conclude that the affidavits offered are inadequate to satisfy the government's burden of proof. In such a case, the government can still request that the court deny a plaintiff's request for a *Vaughn* index in favor of more detailed affidavits, or that the court review the index or the requested documents *in camera*, on the grounds that the production and disclosure of a *Vaughn* index will in fact disclose the very information the government seeks to protect. In other words, the government has mechanisms by which it can accomplish the goal of protecting sensitive information while at the same time satisfying its burden of proof with respect to other exemptions in the original district court proceedings.

Despite the bulk of precedent contradicting its position, the DOJ contends that our opinion in *Senate of Puerto Rico*, 823 F.2d at 580-81, supports its characterization of Exemption 7(A) as meriting unique treatment. In *Senate of*

Puerto Rico, while the district court was in the process of considering motions for summary judgment with respect to Exemption 7(A), the relevant criminal trials ended with guilty verdicts. The DOJ by affidavit acknowledged that Exemption 7(A) no longer applied, and the district court said that the agency could present evidence to demonstrate that the requested documents were properly withheld under other exemptions. Upon review, after discussing at length the competing public policy concerns, we concluded only that the district court did not abuse its discretion in its handling of the case. *See id.* We can find nothing in *Senate of Puerto Rico* that should be construed as supporting the proposition that, when the government withdraws its reliance on Exemption 7(A) after the district court has reached a final decision and an appeal has been filed, the appropriate course of action is necessarily remand to the agency for reprocessing of the FOIA request in question. Accordingly, we conclude not only that the DOJ did not genuinely assert exemptions other than Exemption 7(A) in the court below, but also that it had no legitimate excuse for its failure to do so.

We have recognized two exceptions for unusual situations, largely beyond the government's control: specifically, extraordinary circumstances where, from pure human error, the government failed to invoke the correct exemption and will have to release information compromising national security or sensitive, personal, private information unless the court allows it to make an untimely exemption claim; and where a substantial change in the factual context of the case or an interim development in the applicable law forces the government to invoke an exemption after the original district court proceedings have concluded. *See id.* (relying on *Jordan*, 591 F.2d at 780). As to the first of these, the DOJ does not claim that human error was the cause of its failure

to assert other FOIA exemptions; and as to the second, the only change in this case is the simple resolution of other litigation, hardly an unforeseeable difference.

The DOJ contends that the existence of at least the first round of Maydak's collateral attacks made the possibility of a new trial sufficient to justify the continued application of Exemption 7(A). Although Maydak still has collateral attacks pending just like those that existed at the time the EOUSA reprocessed his FOIA request, the DOJ suggests that the Third Circuit's May 27, 1999, decision regarding Maydak's motion for a new trial rendered sufficiently *de minimis* the likelihood that further collateral attacks might succeed, and thereby reduced the potential for future enforcement proceedings, so that the government could no longer justify withholding under Exemption 7(A). In other words, according to the DOJ, the Third Circuit's May 27, 1999, order affirming the district court's decision to dismiss Maydak's motion for a new trial represents a substantial change in circumstances, both factual and legal, governing Maydak's FOIA request. The DOJ offers no analysis, however, as to why that particular decision crossed any such threshold. Moreover, the DOJ's argument about the decreasing likelihood that Maydak's attacks on his conviction will succeed is inconsistent with the concern, expressed both in its brief and at oral argument, that Maydak will use the requested records, once released, to craft new and improved challenges against his conviction and sentence. The law of the case created by the Third Circuit's denial of Maydak's motion for new trial expressing one legal theory would not preclude that court from granting a motion for new trial based on a different legal theory derived from the requested documents. Accordingly, we hold that there has been no substantial change in the factual or legal context of this case, and thus that there is no reason for us to deviate from our

usual rule of requiring the government to assert all its FOIA exemption claims in the original district court proceedings.

In a final effort to obtain a remand, the DOJ argues that public policy concerns about disclosing information that might otherwise be exempt require this court to exercise its discretion under 28 U.S.C. § 2106 to remand the case for further consideration of the applicability of other FOIA exemptions. That provision provides that "[any] court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment . . . and may remand the cause . . . as may be just under the circumstances." 28 U.S.C. § 2106 (1994). We remand pursuant to 28 U.S.C. § 2106 when doing so best serves such interests as judicial finality and economy and avoiding just the sort of delay that is inappropriate in FOIA cases, *see, e.g., Trans-Pacific Policing Agreement v. United States Customs Serv.*, 177 F.3d 1022, 1028 (D.C. Cir. 1999), or basic justice and fairness. *See Powell v. United States Bureau of Prisons*, 927 F.2d 1239, 1243 (D.C. Cir. 1991).

Our precedents applying 28 U.S.C. § 2106 do not support the DOJ's argument. In *Trans-Pacific*, for example, after concluding that the district court had an affirmative duty to consider *sua sponte* whether the agency could have segregated the exempt portions of the requested records despite the plaintiff's failure to expressly suggest such action, we remanded the case because, otherwise, the plaintiffs could merely file another, more specific FOIA request, which would merely result in a new lawsuit, wasting time, expense, and judicial resources. *See Trans-Pacific*, 177 F.3d at 1023, 1027-29. In the present case, the DOJ does not allege that the district court failed to consider an issue that it properly should have; moreover, the waste in time, expense,

and judicial resources is more likely to occur if we grant the remand that the DOJ seeks than if we deny it.

Similarly, in *Powell*, this court considered the situation of a *pro se* prisoner plaintiff appealing the district court's conclusion that an internal agency manual was wholly exempt and not segregable under FOIA Exemption 2. The court appointed an *amicus curiae* to represent the plaintiff on appeal, and the *amicus* located an unpublished opinion in another FOIA case which demonstrated that portions of the manual had already been released. This court exercised its discretion to grant a remand as serving "the interests of justice and fairness" and the purposes of FOIA on the grounds that the unpublished opinion was directly relevant to the plaintiff's claim that the manual was segregable, yet was unavailable to him at the time of the district court proceedings. *Powell*, 927 F.2d at 1243. The equities of the present case are not comparable. The DOJ was not demonstrably unable to prove its assertion of other FOIA exemptions; it simply chose not to try.

The DOJ again raises *Senate of Puerto Rico* as an example of this court exercising its discretion under 28 U.S.C. § 2106 to allow the government to invoke other FOIA exemptions after Exemption 7(A) was deemed no longer to apply. Contrary to the DOJ's argument, however, in that case, we explicitly left open the applicability of 28 U.S.C. § 2106 in a case such as this one. *See Senate of Puerto Rico*, 823 F.2d at 581. Moreover, we explicitly said that "[w]e will not allow an agency 'to play cat and mouse by withholding its most powerful cannon until after the District Court has decided the case and then springing it on surprised opponents and the judge.'" *Id.* at 580 (quoting *Grumman Aircraft Eng'g Corp. v. Renegotiation Bd.*, 482 F.2d 710, 722 (D.C. Cir. 1973), in which this court upheld an agency's motion for

rehearing in which it raised for the first time a claim of executive privilege).

The DOJ's expressed concerns about public policy are so general as to apply in virtually all situations in which the DOJ declined for whatever reason to raise one or more FOIA exemptions the first time around. The record before us offers no more direct evidence of the applicability of other exemptions than the general and conclusory assertions of the Hull and Boseker Declarations. There is simply nothing in the record to substantiate the DOJ's claims that dire consequences will flow from the release of the requested documents. Furthermore, the DOJ's repeated statements that other specified FOIA exemptions might apply, coupled with its abject failure even to try to substantiate those assertions generically through affidavits, strongly suggests the sort of tactical maneuvering at a plaintiff's expense that we have explicitly rejected. If anything, the notions of judicial finality and economy, avoiding delay, and fairness prominent in our § 2106 jurisprudence dictate an order in Maydak's favor. Accordingly, we decline to exercise our discretion under that provision to remand the case for further proceedings.

Conclusion

Because the DOJ failed to raise the other exemptions upon which it wished to rely in the original district court proceedings, and because the DOJ has offered no convincing reason why it could not have done so, we deny the government's motion for remand, reverse the district court's judgment, and order the release of all requested documents to the appellant.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 97-1830 (EGS)

KEITH MAYDAK, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF JUSTICE, DEFENDANT

[Filed: Sept. 1, 1998]

OPINION & ORDER

Plaintiff Keith Maydak brings an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq, and the Privacy Act, 5 U.S.C. § 552a, to appeal the defendant's denial of his request for documents.

I. Background

In January 1994, plaintiff was tried and convicted of fraud charges in the United States District Court for the Western District of Pennsylvania. Subsequently, in September 1994, plaintiff filed a request for documents under the FOIA. Plaintiff's request was forwarded to the Executive Office for United States Attorneys ("EOUSA"), which identified plaintiff's criminal case file as the relevant documents. The EOUSA denied plaintiff's request because plaintiff's case was on direct appeal in the Third Circuit at the time and because release of such records could be expected to

interfere with the ongoing proceeding. Plaintiff appealed the denial to the Office of Information Privacy ("OIP").

In May 1996, the OIP advised plaintiff that EOUSA would process his request as exemption 7(A), 5 U.S.C. § 552(b)(7)(A), no longer applied to the documents because plaintiff's appeal had been denied in September 1995. In January 1997, however, the EOUSA once again denied plaintiff's request on the basis that plaintiff had since filed a motion under 28 U.S.C. § 2255. Plaintiff then appealed from the denial by the EOUSA and requested expedited processing of his request. In June 1997, the OIP remanded the request to the EOUSA. Plaintiff subsequently filed this action August 1997 arguing that the government has not shown that the documents he requests are exempt from disclosure under FOIA. Plaintiff concedes however that he continues to file post-conviction motions and that some of his motions and appeals are currently pending.

II. Discussion

The parties in this case have filed cross-motions for summary judgment. Defendant moves for summary judgment on the basis that the documents were properly withheld under the claimed exemptions. Plaintiff argues that the documents do not fall under the claimed exemptions.

First, the Court addresses plaintiff's request that a new search be conducted for documents responsive to his FOIA request. The law requires only that a search be adequate. *See Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (question is not "whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate"). Plaintiff's FOIA request specified that records pertaining to him might be located in the Pittsburgh, Pennsyl-

vania and Washington, D.C. Defendant has shown that both of these locations were searched. The Court thus concludes that the search for documents responsive to plaintiff's FOIA request were adequate.

The Court thus goes on to consider pending [*sic*] the cross-motions for summary judgment. In a FOIA case, summary judgment is appropriate if the agency's affidavits are clear, specific, and reasonably detailed, and there is no contradictory evidence on the record, or evidence of bad faith. *See Hayden v. NSA*, 608 F.2d 1381, 1387 (D.C. Cir. 1979). The agency must prove that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from [FOIA's] inspection requirements." *National Cable Television Ass'n v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973); *Cucci v. DEA*, 871 F. Supp. 508, 510 (D.D.C. 1994).

Under exemption 7(A), "records or information compiled for law enforcement purposes . . . [that] could reasonably be expected to interfere with enforcement proceedings" are exempt from disclosure. 5 U.S.C. § 552(b)(7)(A). Defendant claims that the documents plaintiff seeks, which were identified as plaintiff's criminal case file, are covered by exemption 7(A).

Under *Bevis v. United States Dep't of State*, 801 F.2d 1386 (D.C. Cir. 1986), the government must undertake a document-by-document review, group the documents functionally, and then explain how release of each category of documents would interfere with enforcement proceedings. *Id.* at 1389-90. In this case, defendant has met these requirements. *See* Hull Decl. ¶¶ 20-23.

Defendant argues that release of the documents would interfere with enforcement proceedings because plaintiff has

post-conviction motions and appeals pending and if these result in a new trial, plaintiff would have the benefit of the government's work product. *See, e. g.*, Hull Decl. ¶¶ 23-30. Defendant thus argues that the ongoing collateral proceedings relating to plaintiff's case justify withholding the requested documents.

The Court agrees with defendant and therefore concludes that the documents withheld in this case are properly exempted from production under exemption 7(A) because their disclosure could reasonably be expected to interfere with enforcement proceedings.

III. Conclusion

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment [10-1] is **GRANTED**; and it is further

ORDERED that plaintiff's motion for summary judgment [4-1] is **DENIED**; and it is further

ORDERED that plaintiff's motion to compel further searches [16-1] is **DENIED** as **MOOT**; and it is further

ORDERED that plaintiff's motion to compel a supplemental Vaughn index [17-1] is **DENIED** as **MOOT**; and it is further

ORDERED that plaintiff's motion for the Court to appoint a Master [20-1] or to conduct an *in camera* review [20-2] is **DENIED** as **MOOT**; and it is further

ORDERED that the Clerk shall enter final judgment in favor of defendant Department of Justice and against plaintiff Keith Maydak.

Date: 8/31/98 /s/ EMMET G. SULLIVAN

EMMET G. SULLIVAN
UNITED STATES
DISTRICT JUDGE

Notice to:
Keith Maydak
#04904068
Box 350
Beaver, WV 25813

Keith Maydak
#04904068
FCI Ray Brook
PO Box 300
Lake Placid, NY 12977

Keith Maydak
613 Cross Street
East McKeesport, PA 15035

Daria J. Zane
U.S. Attorney's Office
555 4th Street, N.W.
Room 10-818
Washington, D.C. 20001

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-5492

September Term, 2000
97cv01830

KEITH MAYDAK, APPELLANT

v.

DEPARTMENT OF JUSTICE, APPELLEE

[Filed Oct. 30, 2000]

ORDER

BEFORE: SILBERMAN, SENTELLE and ROGERS, Circuit Judges

Upon consideration of appellee's petition for rehearing filed September 1, 2000, and of the responses thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ ROBERT A. BONNER
ROBERT A. BONNER
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-5492

September Term, 2000
97cv01830

KEITH MAYDAK, APPELLANT

v.

DEPARTMENT OF JUSTICE, APPELLEE

[Filed Oct. 30, 2000]

ORDER

BEFORE: EDWARDS, Chief Judge; SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, Circuit Judges

Upon consideration of appellee's petition for rehearing en banc, the responses thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ ROBERT A. BONNER
ROBERT A. BONNER
Deputy Clerk

APPENDIX E

1. The Freedom of Information Act, 5 U.S.C. 552 (1994 & Supp. V 1999) provides in pertinent part:

(b) This section does not apply to matters that are—

* * * * *

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished

information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

* * * * *

2. Federal Rule of Criminal Procedure 6(e) provides:

Recording and Disclosure of Proceedings.

(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.

No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford

those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

(4) Sealed Indictments. The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Number 97-1830 (EGS)

KEITH MAYDAK

v.

U.S. DEPARTMENT OF JUSTICE

DECLARATION OF PAUL E. HULL

I, Paul E. Hull, declare the following:

1. I am an Assistant United States Attorney in the Western District of Pennsylvania, Pittsburgh office. I have been assigned to the White Collar Section of the United States Attorneys Office since approximately September, 1990. My responsibilities include the prosecution of economic crime and fraud matters.

2. I represented the government in the prosecution of Keith Maydak and Shawn Kovack. Maydak and Kovack were charged with wire fraud, mail fraud, access device fraud, and money laundering violations that occurred during the time period from May, 1991 through November, 1991. The case was indicted on or about July 26, 1993. The trial of the criminal case occurred from December 21, 1993 until January 5, 1994, at the conclusion of which Maydak was found guilty on several counts. Maydak's sentencing occurred on April 22, 1994 and June 15, 1994. Thereafter, both Maydak and Kovack filed separate direct appeals to the

United States Court of Appeals for the Third Circuit. Maydak's appeal was filed on or about June 28, 1994. His appeal raised both trial and sentencing issues. He requested a new trial and in the alternative a new sentence. Affirming the District Court judgment, the Third Circuit Court of Appeals issued its mandate disposing of the appeal on September 19, 1995.

3. Before the mandate issued on his direct appeal, Maydak had filed on August 14, 1995 a motion to vacate the restitution ordered by the Court. After this motion was denied, Maydak appealed to the Third Circuit Court of Appeals on September 20, 1995. The appellate mandate concerning this motion was issued on July 8, 1996.

4. On June 11, 1996, Kovack filed a motion to vacate pursuant to 28 U.S.C. §2255. The motion contended that a new trial should be granted because of a violation of due process. Kovack filed an appeal on July 19, 1996 from the denial of his motion to vacate. In conjunction with his appeal, he requested that the Third Circuit issue him a certificate of appealability. The Third Circuit denied his application for certificate of appealability on January 15, 1997.

5. On August 23, 1996, Maydak filed a motion to vacate pursuant to 28 U.S.C. §2255. The motion purported to adopt Kovack's motion and asserted that he had inadequately waived his right to counsel at sentence. He appealed the dismissal of this motion to the Third Circuit on October 31, 1996 requesting that a certificate of appealability be granted. The Third Circuit denied his application for certificate of appealability on April 15, 1997.

6. On August 26, 1996, Maydak filed a motion for recusal of the District Court Judge. The court denied the motion

without necessity for the government to respond. Maydak filed a mandamus action before the Third Circuit on July 1, 1997. This action was denied by the Third Circuit on September 17, 1997. However, the government had to address this issue as part of its appellate responses to Maydak's motion for certificate of appealability on the dismissal of his §2255 motion in early 1997.

7. In connection with the decision made by the District Court concerning his §2255 motion, Maydak filed a motion to vacate the Court's judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure on September 4, 1997. He appealed the Court's denial of that motion to the Third Circuit on September 16, 1997. This appeal is still pending.

8. On August 20, 1997, Maydak filed a motion in the Third Circuit requesting permission to file a successive motion under §2255 concerning the upward departure above the guideline range the District Court granted at sentence. This motion was denied by the Third Circuit on September 17, 1997.

9. On September 3, 1997, Maydak filed a writ of error coram nobis and audita querela challenging his own waiver of counsel at time of sentence. The District Court denied that motion on September 3, 1997. Maydak appealed the denial of these motions on September 26, 1997. This appeal is still pending.

10. On September 4, 1997, Maydak filed a motion pursuant [to] Federal Rule of Criminal Procedure 33 requesting a new trial be granted based on newly discovered evidence. In his motion, he purports to raise claims as to why certain trial evidence was unreliable based on evidence claimed to be newly discovered. For the most part, the newly discovered evidence asserted in his motion was derived from discovery

he gathered in a companion civil action against AT&T in District Court. The government filed a response to that motion on October 21, 1997. The District Court has not decided the motion.

11. On October 22, 1997, Maydak filed a motion in the Third Circuit requesting permission to file a successive motion under §2255 concerning his allegation that his waiver of counsel at time of sentence was invalid. The government responded to this motion by October 29, 1997. This motion is still pending before the Third Circuit. Maydak then sent us a notice to return his juvenile records. This matter is still pending a determination by us of whether Departmental regulations require or permit the return of these types of records.

12. On September 23, 1994, Maydak made a request for records pursuant to FOIA. On September 28, 1994, a Paralegal Specialist from our office forwarded his request to EOUSA for processing. On October 28, 1994, a request was received from EOUSA for a response to Maydak's FOIA request. A Paralegal Specialist from our office responded to the EOUSA concerning the 1994 FOIA request of Maydak. In that response, it was stated that an appeal filed by Maydak was then pending in the United States Court of Appeals for the Third Circuit and indicated that disclosure would interfere with pending law enforcement proceedings.

13. By letter dated November 15, 1994, Maydak's request was denied by EOUSA in accordance with 5 U.S.C. §552 (b)(7)(A), based on the pendency of law enforcement proceedings.

14. On November 15, 1994, the date EOUSA denied Maydak's FOIA request, the status of the case was that Maydak's direct appeal was still pending before the United

States Court of Appeals for the Third Circuit. Eventually, Maydak filed a brief alleging Constitutional errors, trial errors, and sentencing errors. Had he prevailed, the United States Court of Appeals for the Third Circuit would have granted him either a new trial or a new sentencing. The Third Circuit's opinion order affirming judgment of sentence was issued on August 8, 1995. The Third Circuit's mandate was not issued until September 19, 1995. Maydak's period to appeal by writ of certiorari to the Supreme Court was not completed until 90 days thereafter.

15. It should be noted that, even as the Third Circuit was in the process of issuing its mandate for his direct appeal, Maydak had already initiated on August 14, 1995 litigation on a post-sentence motion attacking the District court's restitution judgment. He appealed the denial of that motion the day after the mandate issued in his direct appeal. The government regards the defense of the Court's judgment from post-sentence attacks as part of the enforcement proceeding begun originally with the initiation of criminal charges. Thus, enforcement proceedings by the government continued when it was required to defend Maydak's post-sentence motion which could have resulted in a re-sentencing. The enforcement proceedings continued until July 8, 1996 when the United States Court of Appeals for the Third Circuit rendered its appellate judgment.

16. Furthermore, enforcement proceedings continued from June 11, 1996 until January 13, 1997, when Kovack, Maydak's co-defendant, litigated a motion pursuant to 28 U.S.C. §2255, alleging issues that could result in a new trial, in both District Court and the United States Court of Appeals for the Third Circuit.

17. Since Maydak is requesting a new trial in his pending motion for new trial based on newly discovered

evidence and in separate proceedings before the Third Circuit Court of Appeals also requesting a new sentencing, the re-trial and re-sentencing are considered prospective proceedings.

18. Our Paralegal Specialist has conducted a document-by-document review of the documents pertaining to Mr. Maydak and categorized them. These documents relate to the various law enforcement proceedings involving Mr. Maydak that are ongoing when his FOIA request was originally submitted, up to and through, the law enforcement proceedings now pending. In addition, based on experience, it is anticipated that such proceedings could continue for some time.

19. Most of the documents can be placed into one of the following categories: grand jury materials, attorney/client & work product materials, materials from law enforcement agencies, confidential material from local law enforcement sources, material from confidential sources and from private institutions furnished on a confidential basis, public source materials, exhibits at trial and sentencing, and correspondence. As explained below, disclosure of these materials while the law enforcement proceedings are ongoing will interfere with such proceedings.

Functional Description of Document Categories

20. I have reviewed the documents in each of the categories. The following are accurate descriptions of the various documents in each of the categories:

a) Grand jury materials consisting of a large volume of subpoenas, transcripts, and subpoenaed documents;

b) Attorney client/Work product materials consisting of a stack of material approximately 7 1/2 inches tall that were prepared by the government's attorneys in the preparation of the case for grand jury, trial, and sentencing. The material is almost entirely handwritten by the attorneys for the government or others at their direction. The material generally consists of material prepared during the course of interviewing witnesses during the investigation of the case, preparing the theory of the government's case and the indictment, preparing witnesses for trial and grand jury, determining the content and purpose of demonstrative and other exhibits, preparing jury openings and closing remarks, preparing for direct and cross-examination of potential witnesses, and preparing legal positions concerning various legal issues anticipated. Some of the materials were prepared in the course of the separate appellate proceedings related to both Kovack and Maydak which involved legal research, deliberative efforts, and development of arguments made by the government in response to Maydak and Kovack's positions and issues on appeal.

c) Attorney client/Work product materials consisting of a small amount of typewritten intragency memoranda which were prepared by various Assistant United States Attorneys in this office regarding this case. There is also a small amount of typewritten interagency memoranda concerning this case. Finally, there are several legal memoranda (including copies of cases) that were prepared at my direction which develop, address, and discuss legal theories and positions as to various aspects of the evidence at trial and sentence and various claims and issues as to Maydak's post-sentence matters including pending motions.

d) Attorney client/Work product materials consisting of a stack of documents approximately 2 1/2 inches tall from other federal law enforcement agencies. These documents were compiled in the course of the law enforcement investigation and prosecution of this case. These records include prosecutive reports, reports of interviews of witnesses and other persons contacted during the course of the investigation, interagency communications, evaluations of evidence.

e) Correspondence consisting of a 2 3/4 inch stack of documents relating to grand jury matters, trial preparation, discussions with witnesses and other persons contacted during the investigation and prosecution of this case. In addition, there are a small number of documents to, and from, Maydak, his counsel, the court, and his co-defendant's counsel.

f) Documents consisting of a stack approximately 1/4 inch tall of confidential criminal history information and reports obtained from local and state law enforcement organizations during the course of this prosecution.

g) Documents consisting of a stack approximately 1 1/2 inches tall of documents that were provided in confidence by third parties to advise the government of ongoing matters involving Maydak.

h) Documents consisting of a stack approximately 3 1/4 inches tall of confidential documents that were furnished by a third party to provide financial information.

i) Public source documents consisting of a small amount of press documents and news accounts.

j) Miscellaneous documents consisting of appellate briefs and correspondence, District Court pleadings and transcripts, 2 boxes of trial exhibits, and 1 box of sentencing exhibits.

Interference With Pending or Prospective
Law Enforcement Proceedings

21. At the time of Maydak's FOIA request, he had an appeal pending which could have resulted in a new trial or a new sentencing. Thus, the pending proceedings were the appeal itself and the prospective re-trial and re-sentencing of the criminal case itself.

22. At the time of Maydak's FOIA request, the disclosures sought would have consisted primarily of categories of work product related materials in categories 20 a) through f) and materials from category 20 j) above which were in existence at the time of the request. (Other materials were generated during and after Maydak's FOIA request was made.)

23. At the time of Maydak's FOIA request, the disclosures of the materials sought would have interfered with the appellate proceedings. The wholesale disclosures sought by Maydak would have included disclosures of work product materials related to the government's trial preparation including its notes and legal memos concerning potential problems legal and otherwise which could have been used to craft issues for appeal. Those disclosures would have provided him access to the government's work product which underlay the positions it relied upon in its briefs before the Third Circuit while the appellate matter was pending. It can reasonably be expected that Maydak would use this information to aid him in crafting responses to the government's positions on issues he raised on appeal.

24. At the time of Maydak's FOIA request, the disclosure of the materials sought would have interfered with prospective law enforcement proceedings if he were granted a re-trial and/or a re-sentencing.

25. Had a new trial been granted to Maydak, Maydak should have been in the same legal position with respect to discovery of under [*sic*] the Federal Rules of Criminal Procedure as he was at the time of his initial trial. Disclosure of all information concerning Maydak as requested would have permitted him to obtain numerous documents and information that he would not have been entitled to under the Federal Rules of Criminal Procedure. Such premature disclosures would have been unfair and prejudicial to the government and would certainly have interfered with the prosecution of Maydak at a new trial.

26. Disclosure of these materials would have provided Maydak with a complete record of the government's work product, mental conclusions and deliberations in preparing this case from grand jury through the direct appellate proceedings. Had EOUSA not invoked the pending proceedings exemption, Maydak would thus have had the unfair advantage of using the government's own work product against it at any re-trial granted him following his appeal.

27. The same reasonable likelihood of harm persisted until April, 1997. During this time period, while we can assume his direct appeal was completed in September, 1995, by that time he had already filed a new post-sentence proceeding attacking the restitution part of his sentence. The District and Circuit Court portions of these matters persisted until July, 1996. By that time, co-defendant, Kovack, had filed in June, 1996 a motion pursuant to 28 U.S.C. §2255 alleging he was entitled to a new trial on due

process grounds. Maydak follows suit with a motion pursuant to 28 U.S.C. §2255 purporting to adopt Kovack's arguments and asserting additionally that he was entitled to a new sentencing. The appellate proceeding on Kovack's §2255 motion was not completed until January, 1997. The appellate proceeding on Maydak's §2255 motion was not completed until April, 1997. None of these time periods include the 90 day time period in which Maydak and Kovack had to file appeals to the Supreme Court challenging the Third Circuit Court's rulings.

28. By August, 1997 and September, 1997, Maydak again filed motions in the Third Circuit Court of Appeals the ultimate objective of which is to be granted a new sentencing. He further has filed in roughly the same time period several motions in District Court directed at the same purpose, which are now pending in the Court of Appeals along with the motions he originally filed in that court.

29. By September, 1997, Maydak filed another motion requesting a new trial based on newly discovered evidence. This motion is now pending in District Court.

30. At this time, we face the same reasonably to be expected harms from the requested wholesale disclosure as we did when Maydak originally asked for FOIA disclosures in September, 1994. There are now additional reasons why such disclosures can reasonably be expected to interfere with pending and prospective law enforcement proceedings.

31. First, disclosures of work product materials relative to the pending motions would be unfair since Maydak would be in a position to use against the government its own work product and thinking concerning the potential strengths and weaknesses of Maydak's and its positions in the pending litigations. Maydak would be given the government's

memoranda and research to craft new arguments and defenses to its positions in the pending litigation. It would further reveal the direction and scope of the government's thinking relative to any hearing the District Court might require to dispose of his newly discovered evidence motion. The wholesale disclosures of all categories of the documents sought may spawn additional motions.

32. Second, the chilling effect of the wholesale disclosures sought can reasonably be expected [to] interfere with the government's ability to defend these motions and prosecute any retrial ordered.

33. Maydak is a party in a civil action filed at Civil Action Number 93-1824 by AT&T in United States District Court in Pittsburgh, Pennsylvania. Part of the subject matter in this litigation was the fraud matter involved in the criminal case. Maydak sued as third party defendants Motel Six Corporation, Troutdale Travellodge, GTE Corporation and GTE Northwest, McCaw Cellular, Pacific Bell and Pacific Telesis, and three AT&T employees, Fred Vester, Philip Huffman, and Gerald Tyner. All of these corporations provided evidence in the criminal case. They had personnel called as witnesses during the course of the trial and supplied documents for use as evidence in the criminal case. The individual AT&T employees, Tyner and Huffman, testified at trial.

34. The docket sheet reveals that the third party complaints against most of these entities and individuals were eventually dismissed. A few of these companies, Travellodge and GTE Northwest, were voluntarily dismissed by Maydak. Later, material from these companies was used as part of post-sentence motions Maydak filed in the criminal case for some kind of relief.

35. In addition, Maydak has based his post-sentence motions on matters (e.g. documents, requests for admissions, interrogatories) received as discovery in the civil case from AT&T or its representatives.

36. After Maydak attempted to extend the discovery deadline, discovery in the civil case was closed approximately August 31, 1995.

37. Since most of Maydak's post-sentence motions are founded on information he received in the course of civil discovery from AT&T and other corporate entities, the government must have their voluntary cooperation if it is to address Maydak's contentions based on some request for admission, interrogatory or other matter of discovery. Many of these matters appear to be the subject of substantial controversy in the civil case. Maydak's FOIA request jeopardizes that cooperation. Through litigation counsel, when advised of the possibility of disclosures to Maydak of any past or future communications with the government via FOIA, AT&T has expressed its reluctance, concerns, and reservations about providing such assistance under circumstances where those communications will not be confidential, but subject to FOIA disclosure. Such disclosures may permit Maydak to evade the closing of discovery in the civil case by filing post-sentence motions in the criminal case to cause the government to investigate allegations for the purpose of answering Maydak's motion only to have Maydak insist that the information that he could not request via civil discovery be disclosed to him via a FOIA request. This concern will foreclose the government from gaining needed assistance in answering claims propounded by Maydak. In this manner, Maydak's FOIA request has already begun to interfere with law enforcement proceedings.

38. Such disclosures may subject other individuals, whose cooperation may be revealed by correspondence, confidential documents, work product documents, and grand jury records, to being sued by Maydak in the same way as other witnesses and corporations who provided evidence were sued by Maydak. This also causes reluctance to assist and reduces the government's ability to examine contentions made by Maydak in his various pending motions and any new ones he may file.

39. Moreover, there is a genuine concern about harassment of persons associated with this case. There have been harassment of persons who have been involved in this case. One such example was discussed at sentencing as a basis for a sentence enhancement. It was recounted that an AT&T security employee became the subject of a U.S. Secret Service investigation because of baseless allegations leveled against him. From late 1991 on, this security employee was assisting the federal investigation of Maydak's activities in connection with this fraud scheme. On May 31, 1992, which is relatively shortly after the investigation began in this case, the U.S. Secret Service in Washington, D.C. received a series of calls from a person using the name "john." John alleged that the AT&T security person was selling information about the telecommunications equipment in use in the White House and allegedly providing a listing of extensions in the White [H]ouse, the secret access codes necessary to gain remote access to its telecommunications system, and the secret phone numbers of the White House situation room. A tape recording of one of John's calls was heard by an FBI and U.S. Secret Service agent familiar with Maydak's voice. They believed that Maydak was the speaker. This activity was consistent with activities to harass persons contacted by, or involved in the investigation of the fraud matter alleged against Maydak. This security

person was subjected to questioning by U.S. Secret Service agents unaware of his connection to this fraud investigation in the middle of the night. Other harassment type activities have also occurred to AT&T and with the agents involved in the case. Some of these activities are anonymous and therefore cannot be attributed to anyone specifically.

40. It is reasonably likely that disclosures would have a chilling effect given the legal and other difficulties that have befallen persons who have provided information in this case.

Other Applicable Exemptions

41. While Maydak's FOIA request was denied because there were, and still are, pending law enforcement proceedings concerning which disclosures would interfere, the government did not indicate this was, and is, the only FOIA exemption which applies to the disclosures requested by Maydak in his FOIA request. It is not the intent of the government to waive or forego using all applicable particularized exemptions to the requested wholesale disclosures requested by Maydak.

42. Other particularized exemptions which may be applicable are 5 U.S.C. § 552(b)(5) which exempts from disclosure attorney client/Work product materials in categories 20 b) through e) above; 5 U.S.C. § 552(b)(3) which exempts from disclosure grand jury materials in categories 20 a) and 20 e) above; and 5 U.S.C. §§ 552 (b)(4), (b)(6), and (b)(7)(D) which exempts from disclosure certain confidential matters and sources such as those in categories 20 f), 20 g), and 20 h) above. In addition, these particularized exemptions may overlap with privacy concerns of the individuals and persons whose personal information may appear through the materials in all of the categories such that 5 U.S.C. § 552(b)(7)(C) may be applicable.

Responses to Maydak's Summary Judgment Affidavit

43. I have reviewed the motion for summary judgment and the affidavit submitted by Maydak in this FOIA litigation. He alleges therein that there are no enforcement proceedings pending. I disagree with him. In paragraphs 2 through 11 of this declaration, I have described the matters pending at the time of the original assertion of the pending proceedings exemption and those that are now pending. In his affidavit, he points to certain documents he contends disclosure of which would not interfere with pending law enforcement proceedings. As set forth above, the documents requested fall within the categories identified in paragraph 20. As explained above disclosure would in fact interfere with law enforcement proceedings. For the most part these documents are not appropriate for disclosure. Specific documents to which Maydak refers are discussed below.

44. In paragraph 12 of his affidavit, Maydak claims he is entitled to disclosure of certain telephone records the United States received during its investigation of allegations in a post-sentence motion he filed in August, 1995. These records were not in our possession when he filed his original FOIA request. Maydak claims that the United States secured an order from the District Court to obtain telephone records from GTE, Northwest in 1995. In fact, the order secured in September, 1995 required GTE, Northwest to provide any business records of payments made to AT&T for certain phone calls; it did not require GTE, Northwest to provide telephone records. In response to the court's order, GTE, Northwest provided the phone records as its records of payment. No consent was given by GTE, Northwest or AT&T for disclosure of the records to Maydak, who is not the owner of the phones. These documents are clearly confidential commercial or financial records furnished by a

private institution included in documents specified in paragraph 20 h).

45. In paragraph 13 of his affidavit, Maydak claims that I am refusing to return or provide AT&T with its own documents. These documents were secured by grand jury process. During the trial, some [of] the documents were used as trial exhibits, while others were not. AT&T requested return of the original documents. We have returned to AT&T the originals of the documents it provided the government as part of the grand jury investigation of this case. AT&T has received the documents returned by us including, among others, exhibits used at trial. To the extent any copies of any such documents remain, they remain grand jury matters which should not be disclosed and are referenced in 20 a) above.

46. In paragraph 14 of his affidavit, Maydak claims that I gave AT&T "various documents which relate to . . . [him], i.e. his U.S. Marshal photograph." To the best of my knowledge, I did not provide AT&T with his U.S. Marshals photograph. I was not aware that Maydak was seeking a copy of such photograph. If he is requesting copies of his arrest photographs, I will check on disclosure of such photographs.

47. In paragraph 15 of his affidavit, Maydak claims that we have refused to give back to local authorities any juvenile criminal documents in our possession. Maydak does not indicate the person about whom the juvenile records pertain. However, Maydak sent me a notice on October 6, 1997 which for the first time advised that he had obtained a local court order for the expunction of his juvenile records on October 13, 1994, after he was sentenced in this case. He claims that we are obligated to return any such information to the local authorities by regulations, which he does not cite. This

matter is pending a determination of the validity of his claim that the United States is bound to return such information received pursuant to a court order from a federal district court. From these events, I assume he refers to his own juvenile records. It is correct that we received information about Maydak's juvenile conduct pursuant to order of a federal district court during the prosecution of this case. Should his legal assertions in his notice to return such juvenile records be borne out, we will return such information, as we have, about him to the local court. Since any such documents relate only to Maydak, this material will be disclosed to him.

48. The only documents in the possession of the U.S. Attorneys Office referred to in paragraphs 16 and 17 of his affidavit are trial and sentencing exhibits. The United States has previously provided Maydak with access and copies of these exhibits.

49. The documents in paragraph 18 are grand jury documents which are described in paragraph 20 a) above.

50. The documents referred to in paragraph 19 consist of a redacted exhibit used at sentencing to show Maydak's financial resources by showing that Zero Plus Dialing made payments to Maydak via his company Zankle Investment Group. Another small amount of materials received from Zero Plus Dialing were confidential and are referred to in paragraphs 20 h) above. In addition, any such materials were the subject of a separate prospective law enforcement action in 1994, when the FOIA request was made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 11/15/97

/s/ PAUL E. HULL
PAUL E. HULL
Assistant United States
Attorney
Western District of
Pennsylvania

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 97-1830 EGS

KEITH MAYDAK, PLAINTIFF

v.

U.S. DEPARTMENT OF JUSTICE, DEFENDANT

SUPPLEMENTAL DECLARATION OF PAUL E. HULL

Declarant, Paul E. Hull, comes and states as follows:

1. I have reviewed the declaration submitted by Keith Maydak in Opposition to the Motion for Summary Judgment filed in this case.

2. In several paragraphs, Maydak refers to documents he alleges that relate to separate investigations that have no relevance to the ongoing law enforcement action, CR 93-133 and that were not mentioned as separate matters in response to the FOIA request. Maydak Declaration, Paragraphs 5-10 and 13. Contrary to Maydak's assertion, materials that relate to these other investigations were relevant and part of CR 93-133. A very small amount of materials were used as trial exhibits in this case. The government at time of sentence in this 900 number fraud case sought an upward departure based on the contention that Maydak's criminal history category was inadequate because of the uncharged instances of fraud reflected in these other criminal investigations. The investigative

agencies provided materials from these investigations which were used in the 2 day sentencing phase of the original law enforcement proceeding, CR 93-133. They were the subject of testimony. They were the source of a large number [of] exhibits (i.e., a box full of sentence exhibits, paragraph 20 j) of my original declaration) used at the sentencing. They were made available to Maydak at that time. To the extent that the materials in our possession were not trial or sentencing exhibits, the small amount of materials are included in categories of documents discussed in paragraphs 20 a) through e) of my original declaration. Since Maydak in some of his post-sentence motions seeks a new sentencing with every issue subject to relitigation, premature disclosure of such materials would interfere with any resentencing he may be granted.

3. Other materials referenced in some of those paragraphs, e.g., 6 and 10, were grand jury materials. For instance, the materials referenced in paragraph 10, described in my prior declaration, paragraph 49, were grand jury materials. These materials related to the investigation of Maydak's use of the proceeds of the crimes with which he was eventually convicted in CR 93-133.

4. Other than the sentencing materials used at the sentencing in CR 93-133, a search of the U.S. Attorney's Office did not disclose any other materials in connection with these other investigations. A search was not made of other agencies' files.

5. Maydak contends that no chilling effect will result from disclosing information obtained from other sources. Maydak Declaration, paragraphs 15-17, 18, 21 and 22. However, the subject of these post-sentence motions requires information from the victim, the main victim being AT&T, and witnesses from the criminal case. These individuals

have been sued previously by Maydak. AT&T is currently involved in litigation with Maydak. Requiring disclosure of this information will have a chilling effect on the U.S. Attorney's Office's ability to obtain information to respond to post-sentence motions, which Maydak admits will be forthcoming. The chilling effect is that if the information is disclosed these individuals who have previously been sued will no longer turn over information out of concern that they will be sued again by Maydak or that the information will be used against them. Because some of the post-sentence motions Maydak filed have been based at least in part on materials obtained in discovery in these civil cases involving these individuals, it is crucial for responding to these motions that the United States obtain this information from the victim and these individuals. Should they refuse or be reluctant to turn over the information, the United States will be unable to respond to the various post-sentence motions, thereby interfering with the law enforcement proceedings. Maydak's assertions that subpoenas are available is without a basis in that the investigative subpoena power of the grand jury does not extend to post-sentence motions, therefore the government must have their voluntary cooperation in order to investigate and respond to his post-sentence motions.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 12/31/97.

/s/ PAUL E. HULL
PAUL E. HULL
Assistant United States
Attorney
Western District of
Pennsylvania

APPENDIX H

THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. No. 1:97CV01830 (EGS)

KEITH MAYDAK, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF JUSTICE, DEFENDANT

DECLARATION OF JOHN F. BOSEKER

I, JOHN F. BOSEKER, declare the following to be a true and correct statement of facts:

1) I am an attorney advisor in the Executive Office for United States Attorneys (hereinafter, EOUSA), United States Department of Justice. In such capacity, my responsibilities are *inter alia*, to act as liaison with other divisions and offices of the Department of Justice in responding to requests and litigation filed under both the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1988), and the Privacy Act of 1974 ("PA"), 5 U.S.C. § 552a (1988); to review FOIA/PA requests for access to records located in this office and 94 United States Attorney's offices (USAOs) and the case files arising therefrom; to review the search, the location of records, and the preparation of responses of the EOUSA to assure that determinations to withhold or to release records of EOUSA and the USAOs are in accordance with the provisions of both the FOIA and the PA, and the Department of Justice regulations (28 C.F.R. §§ 16.3 *et seq.*

and §§ 16.40 *et seq.*); and to review copies of correspondence related to requests. As Acting Attorney-in-Charge, I have authority to release and/or withhold records requested under the FOIA and PA, and to advocate the position of the EOUSA in actions brought under those Acts. The statements I make hereinafter, are made on the basis of my review of the official files and records of EOUSA, my own personal knowledge, or on the basis of information acquired by me through the performance of my official duties.

2) Due to the nature of my official duties, I am familiar with the procedures followed by this office in responding to the FOIA/PA request(s) made by the Plaintiff, Keith Maydak, (hereinafter referred to as "Maydak"), to the EOUSA.

CHRONOLOGY

3) By letter dated September 23, 1994, Mr. Maydak made a FOIA/PA request seeking all records on himself purportedly maintained in the United States Attorneys office for the Western District of Pennsylvania. Exhibit A hereto.

4) EOUSA received this letter on October 6, 1994, assigned it number 94-2266, acknowledged this receipt by letter to Mr. Maydak sent on or about this date, Exhibit B hereto, and sent the request on to the U.S. Attorney's office for the Western District of Pennsylvania for search and reply. Exhibit C hereto. (The original records of this file are presently maintained in the Federal Records Center, and have been requested from there. The reconstruction of this portion is based upon information obtained from our internal computer records and my own knowledge of procedures followed routinely in such cases.)

5) By letter of November 15, 1994, EOUSA advised Mr. Maydak that a full denial of his request had been determined to be warranted in accordance with Exemption 5 U.S.C. § 552 (b)(7)(A) (FOIA) and Exemption 5 U.S.C. § 552a(j)(2) (Privacy Act) as to records located in the United States Attorney's office for the Western District of Pennsylvania. Exhibit D hereto. Mr. Maydak was also sent an explanation of these exemptions. EOUSA had been informed by the Assistant United States Attorney handling Mr. Maydak's case in the district that Mr. Maydak had been prosecuted, convicted, sentenced, and appealed that result on June 28, 1994 to the Third Circuit Court of Appeals, which appeal was still pending at the time both the request and the determination were made. Exhibit C hereto. EOUSA determined from this fact that release of any nonpublic information at this time might well interfere with the pending law enforcement action involved, and should the Third Circuit reverse the conviction, the foreseeable subsequent law enforcement proceeding (i.e., new trial) would also be impeded. Consideration was also given to a like circumstance involving Mr. Maydak's co-defendant, Mr. Shawn Kovack, whose legal actions are inseparably intertwined with Mr. Maydak's, as evidenced by the Docket Sheet. Exhibit L hereto.

6) By letter received by the Office of Information and Privacy (OIP) on or about December 27, 1994, Mr. Maydak filed an appeal of the EOUSA determination. OIP assigned the appeal number 94-3004. Exhibit E hereto. By letter of May 29, 1996, (nearly eighteen months later), OIP notified Mr. Maydak that its view was that as the Exemption 7A appeared to be no longer applicable, the case should be remanded to the EOUSA, the records obtained and processed. Exhibit F hereto. (From the record available, it is not possible to ascertain the information upon which this

determination was based. It is EOUSA's position, however, that on the date the determination was originally made, as on the date that the administrative appeal was filed, and through at least July 9, 1996 (the date the Certified Copy of Judgment Order dated May 15, 1996 was entered affirming the judgment of the District Court of September 20, 1995, issued in lieu of a formal mandate on July 8, 1996), that Exemption 7A applied. Exhibit L hereto.

7) By letter of January 27, 1997, EOUSA notified Mr. Maydak that it was in the process of recontacting the United States Attorneys office for the Western District of Pennsylvania, which office was undertaking a search for the requested records anew. The FOIA/PA request was assigned a new FOIA number, 97-279, to reflect this procedure. Exhibit G hereto.

8) By Memorandum dated January 29, 1997, and received by EOUSA on February 1, 1997, EOUSA was notified by the district that Mr. Maydak had filed and had pending another §2255 Motion dated August 26, 1996, Civ. No. 96-1575, which §2255 had been dismissed, and appealed to the Third Circuit Court of Appeals on November 27, 1996, which appeal then-remained pending. Exhibit H hereto. Co-defendant Mr. Kovack had also filed such a motion, denied by the Third Circuit, and was prospectively anticipated to appeal that denial to the Supreme Court. Again, though not determinative, the co-defendant in the Maydak case is subject to consideration in this matter.

9) Once again, by letter of February 7, 1997, EOUSA notified Mr. Maydak that based upon the information received from the district that revealed another pending law enforcement proceeding, it had determined that a full denial of his request was warranted in accordance with the same Exemption 5 U.S.C. §552(b)(7)(A) (FOIA) and Exemption 5

U.S.C. §552a(j)(2) (Privacy Act) as to the records located in the United States Attorneys office for the Western District of Pennsylvania. Exhibit I hereto. Again, an explanation of these exemptions was attached. Also, Mr. Maydak was notified that he could obtain public records upon request made either to the EOUSA or the district court clerk, subject to a copying fee. EOUSA relied upon the information received from the district in making its determination, and the assessment was made again that release of any nonpublic information at that time might well interfere with the pending law enforcement action involved, and should a reversal on appeal occur, the foreseeable subsequent law enforcement proceeding (e.g. new trial) would also be impeded. Exhibit H attached hereto.

10) The OIP received Mr. Maydak's appeal of this determination on March 5, 1997, which appeal was assigned number 97-0814. Exhibit J hereto. By letter of June 27, 1997, Mr. Maydak was advised by OIP that it had determined that as the Exemption (b)(7)(A) was no longer appropriate to withhold the records requested that EOUSA would thereafter obtain and process them. Exhibit K hereto. It appears from the case file that the only reason for this determination was that the May 29, 1996 letter had so stated that this would be done. (*See*, e.g., Paragraph 6 of this Declaration.) There appears to be no record of any contact with the district office regarding the status of the case so as to assess the situation in the manner that the EOUSA did after receiving the district's response in January 1997. (*See*, e.g., Paragraphs 7 and 8 of this Declaration.) To the extent that this is the case, the remand was done in error.

11) In essence, EOUSA asserts that its applications of Exemption (b)(7)(A) were appropriately made on both occasions based upon the information that it received from

the district office and based upon supporting documention provided from that office to EOUSA. EOUSA further asserts that its application of this exemption remains valid given the recent actions generated by Mr. Maydak even while this present litigation is pending. Exhibits L and M hereto.

EOUSA'S DISCLOSURE DETERMINATION

Identification of Responsive Records

12) All of the records which were reviewed in this matter and remain at issue in the above-captioned litigation, were located in the United States Attorney's Office for the Western District of Pennsylvania. The records pertaining to the case are maintained in the Criminal Case File System (Justice/USA-007). The case pertains to the investigation and prosecution of Mr. Maydak for violations of wire fraud criminal statutes. Mr. Maydak has filed numerous appeals and habeas corpus petitions (civil actions, Civil Case File System (Justice/USA-005) in this same district, the criminal prosecution giving rise to the underlying basis in fact and the derivation of the non-public records contained therein, which are at issue. (See Chart, Docket Sheet, attached hereto. Also, see Motion for New Trial and Notice of Appeal attached hereto.)

JUSTIFICATION FOR NON-DISCLOSURE UNDER THE PRIVACY ACT

13) The EOUSA processes all requests by individuals or entities for records pertaining to themselves (as in this case) under both the Freedom of Information and the Privacy Acts in order to provide the requester with the maximum disclosure authorized by law. The Criminal Case Files (Justice/USA-007) and the Civil Case Files (Justice/USA-

005) are part of the Department of Justice Privacy Act System of Records. The Attorney General has promulgated rules exempting these records from the Privacy Act's access provisions as authorized by 5 U.S.C. §552a(j)(2) and (k)(2), which appears at 28 C.F.R. §16.81. Subsection (j)(2) exempts from mandatory disclosure records maintained by an agency or component thereof, which performs as its principal function any activity pertaining to the enforcement of criminal laws. Subsection (k)(2) exempts from mandatory disclosure investigatory material compiled for law enforcement purposes in other than criminal matters, which did not result in a loss of right, benefit, or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence. In that the entire case file(s) pertain to or derive from criminal prosecutions, and were therefore compiled for law enforcement purposes, it was determined that the non-public records withheld, which were responsive to Mr. Maydak's request, were not disclosable under the Privacy Act. Accordingly, the records were then reviewed in accordance with the FOIA provisions.

JUSTIFICATION FOR NON-DISCLOSURE UNDER THE FOIA

EXEMPTION 5 U.S.C. § [552] (b)(7)(A)

14) Exemption (7)(A) permits the withholding of records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings. This exemption has been extended to the appellate stage of prosecution and where post conviction motions are pending. *Helmsley v. United States Dep't of Justice*, No. 90-2413, slip op. at 10 (D.D.C. Sept. 24, 1992). EOUSA asserted this exemption to

the request underlying the present litigation because law enforcement proceedings against Mr. Maydak were still pending at the time the determinations were rendered on both of his FOIA request files. Those proceedings are still pending today. Non-public records responsive to Mr. Maydak's request were deemed integral to these pending law enforcement proceedings. The nature of the law enforcement proceedings were criminal prosecutions, appeals, and post conviction motions therefrom, e.g. motion for new trial, (*See* Exhibit M hereto), of not only Mr. Maydak, but of his co-defendant. A review of the Chart and Docket Sheet provided to this court will reveal a continuous and systematic barrage of such actions not only at the time of the FOIA requests, but inclusive of the present date as well. Exhibits L and M hereto. Any release of non-public information from Mr. Maydak's file at the time the initial and subsequent determinations were rendered on either of these two FOIA requests would have severely impeded and compromised (and any release at this time may also interfere with) the ability of the United States Attorney's office to effectively carry out its prosecutorial functions in these related matters. (Indeed, the history of this case suggests that appeals and post conviction motions are likely to occur upon the closure of the pending appeal proceedings, hence prospective law enforcement proceedings are reasonably foreseeable.) Any success by Mr. Maydak (or his co-defendant) on these post conviction proceedings may necessitate a retrial and use of the non-public records contained in voluminous files. As such, the non-public records at issue were not segregable at the relevant times covered by this litigation, and are not segregable at the present time either.

15) In general, an agency's decision to withhold documents in response to a FOIA request is properly limited to

consideration of whether FOIA exemptions were properly applied and documents properly withheld at the time of the agency's initial assertion of FOIA exemptions. *See, e.g. Raymond T. Bonner v. Dep't of State*, 928 F.2d 1148, 289 U.S. App. D.C. 56 (D.C. Cir. 1991). Other than the public documents, which Mr. Maydak has expressly stated that he does not wish (see Appeal to OIP, Exhibit J hereto) and has never expressed an interest in obtaining throughout the time periods in question (see EOUSA Closing Letter, Exhibit I hereto, which advises of means to obtain same), this office has been advised that under the circumstances of this prosecution and continuous appeals, nothing further is segregable or disclosable without severely compromising the prosecutorial functions in this complex criminal prosecution.

16) EOUSA asserts, therefore, that the documents at issue have at all times been properly withheld under Exemption 7(A). They are documents related to the subject law enforcement proceedings that are also currently pending. In addition, as stated, their disclosure would then - and presently - interfere with the government's prosecution of such proceedings. As there is a possibility that Mr. Maydak's entire conviction could be reversed, disclosure of such materials now in conjunction with such a reversal, would severely compromise the United States' pending law enforcement proceedings.

17) EOUSA has been advised by the district, following its document-by-document review of the materials, that the records involved with this prosecution and numerous post-conviction actions involve multiple file drawers and several boxes, comprising several thousand pages of materials. The district has estimated that approximately twenty percent of this material are public records. The basic categories of non-public records involved are typical of this type of case: grand

jury materials (approximately one file drawer); third party witness-related materials (approximately one file drawer), which includes confidential informants' statements, made with expressed or implied confidentiality; other agency records (FBI, Secret Service, Postal Service, Internal Revenue Service), which would be referred to those agencies for review and processing if and when these records are properly subject to comprehensive review and actual processing with respect to other exemptions; state and local investigatory records; correspondence; attorney notes and trial and appellate preparation work product and deliberative process materials; lab reports not produced at the original trial. (It is not presently possible to ascertain a numerical count regarding each category, given the volume of material involved in the review, and that the case remains active.) While EOUSA asserts that all of these records fall within Exemption 7(A), this review has revealed that these records are also subject to other FOIA exemptions (e.g., (b)(3) and Federal Rule of Criminal Procedure 6(e) (grand jury materials), (b)(5) (intra-agency/ inter-agency communications made in anticipation of litigation being attorney work product and deliberative process), and (b)(7)(C), (b)(6) (materials disclosure of which would lead to clearly unwarranted and unwarranted [*sic*] invasion of personal privacy of protected third party individuals), (b)(7)(D) (state and local records, confidential source materials protected from disclosure), (b)(7)(E) (materials which if disclosed would reveal law enforcement techniques that would enable circumvention of the law), and (b)(7)(F) (there are reports of witness intimidation and other harassment involved in this case). A description of these non-public records withheld by Exemption 7(A) is set forth in the Declaration of Assistant United States Attorney Paul Hull, United States Attorneys' Office for the Western District of Pennsylvania, where the subject records are maintained.

18) Each step in the handling of Mr. Maydak's request has been consistent with the EOUSA and the United States Attorney's office procedures, which were adopted to insure an equitable response to all persons seeking access to records under the FOIA/PA.

I declare under penalty of perjury that the foregoing is true and correct.[1]

Executed on November 4, 1997.

/s/ JOHN F. BOSEKER
JOHN F. BOSEKER
Acting Attorney-in-Charge
EOUSA FOIA/PA Unit

---

[1] The various Exhibits referred to in the declaration are omitted from this appendix.

Supreme Court, U.S.
FILED
JUN 1 2001
CLERK

No. 00-1507

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE,
Petitioner,

v.

KEITH MAYDAK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

DEANNE E. MAYNARD *
DAVID C. BELT
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

* *Counsel of Record*

June 1, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether, under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the government, which has the burden of proving that any requested documents are exempt from FOIA's general rule of disclosure, can raise an exemption claim only under 5 U.S.C. § 552(b)(7)(A) ("Exemption 7(A)") in the face of an opposing party's motion for summary judgment and then, on appeal, be allowed to raise new exemption claims solely on the ground that it elected to withdraw its Exemption 7(A) claim while the case was pending on appeal.

2. Whether the government's failure to raise a FOIA exemption claim in district court must be excused whenever the government on appeal contends, without elaboration, that some of the documents may have been exempt from disclosure under that exemption if the government had raised that exemption claim during the initial district court proceedings.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. Background 2

B. Proceedings in the D.C. Circuit 5

REASONS TO DENY THE PETITION 9

I. The D.C. Circuit's Decision Is Consistent with Prior Decisions of this Court and Does Not Conflict with Any Decision of Another Court of Appeals. 9

A. The D.C. Circuit Correctly Applied Settled Litigation Principles in Determining That the Government, Which Bears the Burden of Proof on the Applicability of FOIA Exemptions, May Not Prevail on Exemption Claims That it Did Not Raise in the Initial District Court Proceedings. 9

B. The D.C. Circuit's Refusal to Graft onto FOIA a Special Exception for Cases in Which an Exemption 7(A) Claim Is Raised and Abandoned Is Not in Conflict with this Court's Decision in *NLRB v. Robbins Tire & Rubber Co.* Or with a Decision of Any Court of Appeals. 13

TABLE OF CONTENTS - continued

Page

II. The Facts of this Case Do Not Present the Questions or Concerns Posited by the Government That Would Follow from Having to Raise Multiple Exemption Claims Simultaneously. 17

III. There Is No Independent Need to Review the Government's Contention That the Requested Records May Have in Part Been Subject to Other FOIA Exemptions Had the Government Raised Such Exemptions. 20

CONCLUSION 23

TABLE OF AUTHORITIES

CASES Page

Arizona v. California, 530 U.S. 392 (2000) 9

Avondale Industries, Inc. v. NLRB, 90 F.3d 955 (5th Cir. 1996) 15

Barney v. IRS, 618 F.2d 1268 (8th Cir. 1980) 15

Bevis v. Department of State, 801 F.2d 1386 (D.C. Cir. 1986) 16

Bonner v. United States Department of State, 928 F.2d 1148 (D.C. Cir. 1991) 6

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 10

Chilivis v. SEC, 673 F.2d 1205 (11th Cir. 1982) . . . 15, 16

Citizens Commission on Human Rights v. FDA, 45 F.3d 1325 (9th Cir. 1995) 19

Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854 (D.C. Cir. 1980) 15

Computer Professionals for Social Responsibility v. United States Secret Service, 72 F.3d 897 (D.C. Cir. 1996) 15

Crancer v. DOJ, 999 F.2d 1302 (8th Cir. 1993) 16

Curran v. DOJ, 813 F.2d 473 (1st Cir. 1987) 14

Dickerson v. DOJ, 992 F.2d 1426 (6th Cir. 1993) 15

District of Columbia v. Air Florida, Inc., 750 F.2d 1077 (D.C. Cir. 1984) 10

DOJ v. Landano, 508 U.S. 165 (1993) 14

TABLE OF AUTHORITIES - continued

Page

DOJ v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) 14, 15

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979) 22

FTC v. Grolier, Inc., 462 U.S. 19 (1983) 14

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 12

Fountain v. Filson, 336 U.S. 681 (1949) 11

Irons v. FBI, 880 F.2d 1446 (1st Cir. 1989) 21, 22

Jenkins v. Anderson, 447 U.S. 231 (1980) 9

Jordan v. DOJ, 591 F.2d 753 (D.C. Cir. 1978) 9, 10

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) . . . 10

Manna v. DOJ, 51 F.3d 1158 (3d Cir. 1995) 15

Marzen v. Department of Health & Human Services, 825 F.2d 1148 (7th Cir. 1987) 15

Massey v. FBI, 3 F.3d 620 (2d Cir. 1993) 21

Maynard v. CIA, 986 F.2d 547 (1st Cir. 1993) 19

Miller v. Avirom, 384 F.2d 319 (D.C. Cir. 1967) 9

Moorefield v. United States Secret Service, 611 F.2d 1021 (5th Cir. 1980) 4

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) . . . . . *passim*

Nebraska v. Wyoming, 507 U.S. 584 (1993) 10

North v. Walsh, 881 F.2d 1088 (D.C. Cir. 1989) 17

TABLE OF AUTHORITIES - continued

Page

Ryan v. DOJ, 617 F.2d 781 (D.C. Cir. 1980) 9

Sherman v. United States Department of the Army, 244 F.3d 357 (5th Cir. 2001) 21

Solar Sources, Inc. v. United States, 142 F.3d 1033 (7th Cir. 1998) 14

United States Department of State v. Ray, 502 U.S. 164 (1991) 10

Vaughn v. United States, 936 F.2d 862 (6th Cir. 1991) 19

Washington Post Co. v. United States Department of Health & Human Services, 795 F.2d 205 (D.C. Cir. 1986) 8, 9

STATUTES

28 U.S.C. § 2106 ..... 8, 18

5 U.S.C. § 552 1

5 U.S.C. § 552(a)(3) 1

5 U.S.C. § 552(a)(4)(B) 2

5 U.S.C. § 552(b) 1

5 U.S.C. § 552(b)(6) 21

5 U.S.C. § 552(b)(7)(A) ..... *passim*

5 U.S.C. § 552(b)(7)(C) 21

Fed. R. Civ. P. 8(c) 16

TABLE OF AUTHORITIES - continued

Page

Fed. R. Civ. P. 56(c) 11

Fed. R. Crim. P. 6(e) 22

No. 00-1507

IN THE
Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE,
Petitioner,

v.

KEITH MAYDAK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In this case, the D.C. Circuit held that, under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, the government could not raise for the first time on appeal or on remand following appeal any exemption claims that it did not raise in the initial district court proceedings. This holding did not fashion any new or sweeping legal principles. It involved nothing more than the application of a rule that the D.C. Circuit has followed for more than two decades — a rule that follows inexorably both from the normal rules of civil litigation and from FOIA's assignment to the government the burden of proving that requested records fall within one or more of the statutory exemptions from disclosure. 5 U.S.C. §§ 552(a)(3), 552(b). That decision is not in conflict with any prior decision of this Court or of any court of appeals, and is plainly correct.

What the government seeks here is a special rule that would allow the government to litigate any FOIA case twice whenever the government invokes FOIA Exemption 7(A) during the initial district court proceedings. Exemption 7(A) allows agencies to withhold "records or information compiled for law enforcement purposes" to the extent that the production of such records or information "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). The D.C. Circuit's refusal to adopt such a rule does not conflict with the decisions of this Court or any other court. Finally, even accepting the fundamental premise of the petition — that there are circumstances in which providing evidence in support of other exemption claims would undermine the government's reliance on Exemption 7(A) — this is an inappropriate vehicle for reconciling this purported tension among FOIA exemptions. The government abandoned its reliance on Exemption 7(A) *before* even raising this necessarily case-specific concern. Moreover, the harms that it believes could flow from having to assert multiple exemption claims during an ongoing criminal investigation are simply not present here, particularly since not only the investigation but the trial and appeal were long concluded by the time the government even raised Exemption 7(A) in the first place. The government has never provided any reason that *in this case* it could not have asserted other exemption claims simultaneously, so the D.C. Circuit's refusal to graft onto FOIA a *per se* rule allowing the government to raise its exemption claims piecemeal where Exemption 7(A) is raised and then abandoned on appeal will have a minimal impact, and is therefore a poor candidate for plenary review by this Court.

A. Background

In September 1994, respondent Keith Maydak ("Maydak"), who was then incarcerated, filed a request under FOIA for copies of documents pertaining to or mentioning him. In

September 1995, Maydak's conviction became final when the Third Circuit affirmed Maydak's conviction and Maydak elected not to file a petition for certiorari in this Court.[1] In February 1997, after an initial denial and administrative remand of Maydak's FOIA request, the Executive Office for United States Attorneys ("EOUSA") denied Maydak's request in full, citing Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), which allows an agency to withhold records or information to the extent that their production "could reasonably be expected to interfere with enforcement proceedings." *Id.* The only "enforcement proceeding" that the EOUSA cited in its administrative denial was a "Section 2255 motion" that Maydak had filed in August 1996, which had been dismissed in September 1996 but which was on appeal in the Third Circuit. (Pet. App. 3a.) No other FOIA exemptions were cited at any point during the administrative proceedings. (Pet. App. 3a.)

In August 1997, Maydak filed suit pursuant to 5 U.S.C. § 552(a)(4)(B). (Pet. App. 4a.) After receiving the government's answer, which asserted only Exemption 7(A) as a defense to disclosure,[2] Maydak moved for summary judgment, asserting that, because he had already been convicted, there was no "enforcement proceeding" pending against him and the exemption relied upon by the government did not apply. (Pet. App. 4a; Pl. Mot. for Summ. J. at 3-4 (D.D.C. filed Oct. 16, 1997)). The government opposed and cross-moved for summary judgment, contending that

---

[1] *See* Joint Appendix of Appellee and Counsel Appointed as *Amicus Curiae* in Support of Appellant, at 25, 82 (D.C. Cir. filed Jan. 27, 2000) (hereafter "J.A."). The petition's suggestion that Maydak's appeal from his criminal conviction was pending at the time his FOIA request was denied in February 1997 is inaccurate. (Pet. at 3.)

[2] *See* Answer (D.D.C. filed Sept. 29, 1997) (J.A. 10-15).

Exemption 7(A) continued to apply after Maydak's conviction had become final because Maydak had filed "a continuous and systematic barrage of" post-conviction motions that collaterally attacked his conviction, and that such filings "have continued, unceasingly, up to the present and can be expected to continue." Def. Mot. for Summ. J. at 13, 24 (D.D.C. filed Nov. 17, 1997). The government maintained that disclosing any of the requested documents would interfere with its ability to respond to the collateral motions and would hinder the government's ability to re-prosecute Maydak were any of the collateral motions successful. (Pet. App. 4a.)

The propriety of the government's reliance on Exemption 7(A) was from the outset highly suspect — no court ever had held that Exemption 7(A) continues to apply after the underlying criminal case to which the records relate has become final and where the records were not otherwise being used in the investigation of other crimes. Indeed, the government's theory appeared to ignore this Court's admonition in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), that Exemption 7(A) was intended to protect against disclosure of information before the government had the opportunity to present its case in court, 437 U.S. at 224-25, and not to "endlessly protect material simply because it was in an investigatory file," *id.* at 230.[3] Despite the shaky ground on which its Exemption 7(A) claim rested, and despite the fact that the government bore the burden of proving that the requested records need not be released, the government did not raise any other FOIA exemptions in the district court. The government mentioned other exemptions that it "tentatively" believed "may" apply, but made clear that it had not reviewed the

---

[3] *See also, e.g., Moorefield v. United States Secret Serv.*, 611 F.2d 1021, 1024-25 (5th Cir. 1980) (usually the purpose of investigation expires "when its goal, the holding of an adjudicatory proceeding, is reached").

requested documents to determine whether any such exemptions actually applied and therefore was not asserting such exemptions.[4] On September 1, 1998, the district court denied Maydak's motion for summary judgment and granted the government's cross-motion, agreeing with the government that "release of the documents would interfere with enforcement proceedings because [Maydak] has post-conviction motions and appeals pending." (Pet. App. 21a-22a.)

B. Proceedings in the D.C. Circuit

Maydak appealed. Both parties moved for summary disposition on the question of Exemption 7(A)'s applicability. The D.C. Circuit denied both motions and appointed counsel as *amicus curiae* on behalf of Maydak (who was representing himself).[5] The court directed the parties and *amicus* to brief

---

[4] *See, e.g.*, Def. Reply Mem. to Pl. Mot. for Summ. J. at 15-16 (D.D.C. filed Jan. 2, 1998) ("In its Motion for Summary Judgment, . . . the Department of Justice revealed all exemptions that it had *tentatively* identified at the time that *may* apply to the subject documents. . . . In its Motion for Summary Judgment, defendant cited to the various exemptions that *may* apply to the documents notwithstanding the application of Exemption 7(A), e.g., Exemptions (b)(3), (b)(5), (b)(7)(C) and (b)(7)(D).") (emphasis added); Pet. App. 45a (listing "exemptions which *may* be applicable") (emphasis added); Def. Mot. for Summ. J. at 18-19 (conceding that "no comprehensive [document] review has been completed").

[5] The court appointed Jenner & Block, LLC, as *amicus curiae* to present arguments on Maydak's behalf and, in that capacity, undersigned counsel David C. Belt filed an *amicus* brief and participated in oral argument. Undersigned counsel is now representing Maydak before this Court.

whether Exemption 7(A)'s protection of "enforcement proceedings" applies to collateral attacks on a final conviction.[6]

Rather than risk a potentially adverse decision on that question, the government informed Maydak that it was abandoning altogether its reliance on Exemption 7(A), claiming that the exemption no longer applied because the Third Circuit had affirmed the dismissal of one of Maydak's numerous collateral motions. The government did not claim that the Third Circuit's ruling *required* it to abandon its Exemption 7(A) claim. Nor could it, since it has long been settled law in the D.C. Circuit that, in determining whether requested documents were properly withheld, "court review properly focuses on the time the determination to withhold is made," not the time of the court's review of that decision. *Bonner v. United States Dep't of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991) (R.B. Ginsburg, J.). Moreover, the Third Circuit ruled on only one of Maydak's collateral motions; as the government was made aware prior to withdrawing its Exemption 7(A) claim, Maydak still had several collateral motions pending and contemplated filing several more, including a petition for certiorari from the Third Circuit's ruling. The government

---

[6] Specifically, the D.C. Circuit directed briefing on the following:

> (1) whether FOIA Exemption 7(A) continues to apply as long as a criminal defendant is pursuing a post-conviction collateral attack on the judgment or sentence entered in a criminal enforcement proceeding to which the withheld records relate; and (2) whether appellee, through its submissions below, met its burden of justifying its invocation of Exemption 7(A) to shield all the records it identified as falling within the various record categories, as well as the residual records not specifically categorized . . . .

Order, at 1-2 (D.C. Cir. Mar. 24, 1999) (Pet. App. 6a.)

could have continued to maintain that Exemption 7(A) applied at the time of its February 1997 decision to deny Maydak's request, and thus might have avoided all the questions and concerns that it now manufactures in this petition.

Having chosen to abandon its reliance on the only exemption claim it presented in the district court, the government then sought to have its cake and eat it too. Rather than turn over the documents that Maydak requested, the government on August 26, 1999, filed in the D.C. Circuit a Further Motion for Remand Based on Changed Circumstances ("Further Motion for Remand"), which sought a remand to administratively "reprocess the [requested] documents and release them insofar as other FOIA exemptions do not apply to them." Appellee's Further Motion for Remand at 3 (D.C. Cir. filed Aug. 26, 1999).[7] Maydak and *amicus* opposed the remand motion, arguing that the government was foreclosed from asserting new exemption claims — let alone ascertaining whether even to assert new exemption claims — because it had failed to raise them in the initial district court proceedings and because the Third Circuit's ruling on one of Maydak's collateral attacks did not materially change the factual context of the case. The government again conceded that it had not raised other exemptions in the district court; indeed, it claimed that Maydak's opposition to its motion was "premature" precisely because "other exemptions have not been asserted as the reprocessing has not taken place." Appellee's Reply to Appellant's and Amicus Curiae's Oppositions to Motion for Further Remand at 6 (D.C. Cir. filed Sept. 29, 1999). A declaration attached to the government's Further Motion for

---

[7] This was the government's second attempt to have the case remanded; the first request, filed almost immediately after the D.C. Circuit ordered briefing, conceded partial error. (Pet. App. 6a.) That motion was pending at the time of the government's Further Motion for Remand.

Remand estimated that it would take approximately four weeks to "review, process and effect release of the documents to which Maydak may be entitled."[8] The D.C. Circuit referred the Further Motion for Remand to a merits panel.

After full briefing and argument, at which the government again conceded that it had not reviewed the documents to determine whether other exemptions applied while the case was pending in the district court, a panel of Judges Silberman, Sentelle, and Rogers rejected the government's request to begin the administrative process anew. Relying on the well-established rule of that Circuit that the government ordinarily "must raise all its claims of exemption in the original proceedings in district court, and may not thereafter assert new claims of exemption, either on appeal or on remand following appeal," *Washington Post Co. v. United States Dep't of Health & Human Servs.*, 795 F.2d 205, 208 (D.C. Cir. 1986) (Scalia, J.), the panel first concluded that the government failed to raise any exemptions other than Exemption 7(A) in the initial district court proceedings. (Pet. App. 8a-10a.) The court then rejected the government's two arguments for why it should be excused for that failure: that the "unique nature of its burden of proof under Exemption 7(A)" relieves it of "even attempting to substantiate its claims with respect to . . . other exemptions," (Pet. App. 10a-14a), and that the Third Circuit's decision as to one of Maydak's collateral motions constituted a "substantial change in the factual or legal context of this case," (Pet. App. 14a-16a). Finally, the panel declined to exercise its discretion under 28 U.S.C. § 2106 to remand the case, reasoning that the interests in "judicial finality and economy, avoiding delay, and fairness" outweighed the government's eleventh-hour and unsupported assertions that some of the information sought

---

[8] Decl. of Suzanne Little at 5 (D.C. Cir. filed Aug. 26, 1999) (J.A. 143).

would have been protected by other FOIA exemptions had it raised them. (Pet. App. 16a-18a.)

REASONS TO DENY THE PETITION

I. The D.C. Circuit's Decision Is Consistent with Prior Decisions of this Court and Does Not Conflict with Any Decision of Another Court of Appeals.

A. The D.C. Circuit Correctly Applied Settled Litigation Principles in Determining That the Government, Which Bears the Burden of Proof on the Applicability of FOIA Exemptions, May Not Prevail on Exemption Claims That it Did Not Raise in the Initial District Court Proceedings.

The D.C. Circuit's opinion applied the long-established proposition that, because the government has the burden of raising and proving the applicability of any FOIA exemptions, the government ordinarily "must raise all its claims of exemption in the original proceedings in district court, and may not thereafter assert new claims of exemption, either on appeal or on remand following appeal." *Washington Post Co. v. United States Dep't of Health & Human Servs.*, 795 F.2d 205, 208 (D.C. Cir. 1986) (Scalia, J.); *accord Ryan v. DOJ*, 617 F.2d 781, 789 (D.C. Cir. 1980); *Jordan v. DOJ*, 591 F.2d 753, 780 (D.C. Cir. 1978). There is nothing new about this rule, and it does not conflict with the decisions of this Court or any other court. Nor is it specific to the FOIA context; courts routinely have followed some variant of the rule that a party that bears the burden of persuasion, or even the burden of production, on an issue must present that issue in the trial court. *See, e.g., Arizona v. California*, 530 U.S. 392, 409 n.3 (2000); *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980); *Miller v. Avirom*, 384 F.2d 319, 321-22 (D.C. Cir. 1967) (explaining that rule confining appellate courts to issues raised and preserved

initially in trial court reflects "considerations of fairness to the court and the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact," and "prevents the trial of cases piecemeal or in installment") (citations omitted; *cited in Jordan*, 591 F.2d at 779 n.114). *See also District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084-85 (D.C. Cir. 1984) (Without rule that party must raise its arguments at first opportunity in trial court, "[e]normous confusion and interminable delay would result. . . . Almost every case would in effect be tried twice.").

Moreover, the D.C. Circuit's approach is fully consistent with black-letter principles governing summary judgment. As in any civil litigation, where, as here, "the nonmoving party bears the burden of proof at trial, summary judgment is warranted if the nonmovant fails to 'make a showing sufficient to establish the existence of an element essential to [its] case.'" *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (while "general factual allegations" may suffice at pleading stage, party with burden of proof must produce actual evidence at summary judgment stage in support of its claims); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (summary judgment mandated, on motion, against party who fails to make a showing sufficient to establish essential element "on which that party will bear the burden of proof at trial").

The application of these principles to this case could not have been more straightforward. Once Maydak moved for summary judgment and demanded disclosure of the responsive documents, the government, which bore the ultimate burden of proving that the documents were exempt from disclosure, *see United States Dep't of State v. Ray*, 502 U.S. 164, 173 (1991), had the burden of coming forward with evidence that its

continued withholding of the requested documents was proper. The government chose to come forward with evidence only in support of its Exemption 7(A) claim — as the D.C. Circuit found, the government never "even claim[ed] that it tried to satisfy [its] burden of proof" under another exemption. (Pet. App. 10a.) Accordingly, once the government withdrew its reliance on Exemption 7(A), no issue of fact remained as to whether the government's withholding was proper, and the D.C. Circuit correctly concluded that Maydak was entitled to judgment as a matter of law.[9]

The precedents of this Court on which the petition relies are not inconsistent with — and indeed completely support — the D.C. Circuit's disposition of the issues here. For example, in *Fountain v. Filson*, 336 U.S. 681 (1949), this Court concluded that the D.C. Circuit erred when, having reversed the district court's grant of the defendant's motion for summary judgment on one issue, it directed the entry of summary judgment for plaintiffs on a different issue as to which the defendants "had no opportunity to present a defense before the trial court." *Id.* at 683. The defendants lacked the opportunity to present a defense, the Court made clear, because plaintiffs had never themselves moved for summary judgment. *Id.* Here, Maydak *did* move for summary judgment, seeking an order compelling disclosure of the requested documents; under *Fountain*, and *Celotex*, and Fed. R. Civ. P. 56(c), this placed the burden on the government of presenting evidence in favor of any exemption claims that it wished to assert. Its failure to do so, despite having the burden of proof, aligns the D.C.

---

[9] Contrary to the petitioner's suggestion (Pet. at 18-19), nothing in the D.C. Circuit's opinion required that the government, in order to "raise" an exemption claim, itself move for summary judgment on the basis of that claim. The D.C. Circuit stated only that the government must at least "attempt to substantiate those claims" with evidence. (Pet. App. 9a.)

Circuit's resolution perfectly with this Court's decision in *Fountain*.[10]

The government half-heartedly indicates that it did "raise" other FOIA exemptions by mentioning in its district court papers the "potential" applicability of exemptions other than 7(A). (Pet. at 4-5, 20-21.) But the D.C. Circuit squarely rejected that suggestion, concluding that the government's "cursory, equivocal, and inconsistent" assertions that other exemptions "may" apply, combined with the government's repeated acknowledgment that it never actually "processed" the documents to determine whether such exemptions in fact applied, much less attempted to substantiate any such claims in the district court, was insufficient to raise such exemptions. (Pet. App. 8a-9a.) The D.C. Circuit's decision on this point is plainly correct; the government's burden under settled summary judgment principles is to come forward with evidence, not bald and conditional allegations. In any event, the government has repeatedly conceded throughout this litigation that it did not raise any other exemption claims in the district court. Indeed, the government's Motion For Further Remand Based on Changed Circumstances argued that a remand — rather than outright reversal — was appropriate precisely because it had *not* raised other exemptions.[11]

---

[10] The other cases cited in the petition (*see* Pet. at 20 & n.12) merely apply the same principle set forth in *Fountain* that an appellate court may not rule as a matter of law in one party's favor on an issue as to which the opposing party has not had a fair opportunity to respond. *See, e.g.*, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 156 (1963) (declining to issue an injunction based on evidence that was never admitted into evidence and as to which the defendants never had an opportunity to object).

[11] *See* Appellee's Reply to Appellant's and Amicus Curiae's Oppositions to Motion for Further Remand at 6 (D.C. Cir. filed Sept. 29, 1999) (asserting that *amicus*'s claim that the government be required to

B. The D.C. Circuit's Refusal to Graft onto FOIA a Special Exception for Cases in Which an Exemption 7(A) Claim Is Raised and Abandoned Is Not in Conflict with this Court's Decision in *NLRB v. Robbins Tire & Rubber Co.* Or with a Decision of Any Court of Appeals.

The government's principal argument in its petition is that this settled law should not apply here, and that a new and different rule ought to apply when an Exemption 7(A) claim is involved because, the government posits, Exemption 7(A) does not require the same "individualized" showing that other exemption claims demand. (Pet. at 8-9.) The D.C. Circuit's refusal to adopt such a new rule does not conflict with any decision of this Court or of any other court of appeals.

Certainly, nothing in the text of FOIA supports such a special rule for Exemption 7(A) — as the D.C. Circuit recognized, on the face of the statute "Exemption 7(A) is simply one [exemption] on a list of many." (Pet. App. 11a.) Nor, contrary to the government's claims, does this Court's holding in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), mandate such preferential status for Exemption 7(A). *Robbins Tire* stands for the proposition that Exemption 7(A) does not foreclose courts from determining that, "with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally 'interfere with enforcement proceedings.'" 437 U.S. at 234-36. *Robbins Tire* thus relieved the government of having to prove in all cases that disclosure of such records would *actually* interfere with the *particular* proceeding at issue.

---

released requested documents rather than raise additional exemptions "is premature. *At present, other exemptions have not been asserted* as the reprocessing has not taken place. As such, there is no pending controversy with regard to assertion of other exemptions.") (emphasis added).

Id. Nothing in *Robbins Tire* purported to prescribe a particular method of establishing an Exemption 7(A) claim, nor suggested that the government cannot raise an Exemption 7(A) claim simultaneously with other exemption claims.[12] Indeed, the government there raised several exemption claims in addition to its Exemption 7(A) claim. 437 U.S. at 216-17, 219 & n.3. The decision below is thus entirely consistent with *Robbins Tire*.

Nor does the D.C. Circuit's decision conflict with the decisions of other Circuits. Indeed, none of the cases cited in the petition even presented the question that the government now asks — whether the assertion of Exemption 7(A) forgives the failure to raise other exemption claims in the district court proceeding or whether raising other claims simultaneously would reveal information protected by Exemption 7(A). *Curran v. DOJ*, 813 F.2d 473 (1st Cir. 1987) (Pet. at 9), and *Solar Sources, Inc. v. United States*, 142 F.3d 1033 (7th Cir. 1998) (Pet. at 9), presented questions involving whether the government's Exemption 7(A) showing provided the district court an adequate factual basis from which to rule on *that* exemption's applicability. Because here the government

---

[12] The only textual support in *Robbins Tire* cited by the government for the proposition that Exemption 7(A) is "unique" is the *dictum* in which the Court noted that, while Exemptions 7(B), 7(C), and 7(D) "refer to particular cases," Exemption 7(A) "speaks in the plural voice about 'enforcement proceedings.'" (Pet. at 12-13, quoting *Robbins Tire*, 437 U.S. at 223-24.) But in *DOJ v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), this Court quoted that passage from *Robbins Tire* and squarely rejected any claim that this *dictum* establishes the "uniqueness" of Exemption 7(A). *See* 489 U.S. at 776-77. *Accord DOJ v. Landano*, 508 U.S. 165, 179 (1993) (under Exemption 7(D), "[t]here may well be other generic circumstances in which an implied assurance of confidentiality fairly can be inferred"); *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983) (same under Exemption 5).

abandoned on appeal its reliance on that exemption, these questions were not before the D.C. Circuit. And neither *Curran* nor *Solar Sources* involved a situation where the government sought to raise more than one exemption claim, let alone to raise exemption claims in a piecemeal fashion.

The other cases the government cites involve circumstances where the government *did* raise multiple exemption claims in the initial district court proceeding — ironic, given the petitioner's suggestions that it cannot be done. *See Barney v. IRS*, 618 F.2d 1268 (8th Cir. 1980) (per curiam); *Dickerson v. DOJ*, 992 F.2d 1426 (6th Cir. 1993); *Chilivis v. SEC*, 673 F.2d 1205 (11th Cir. 1982).[13] More important, the holdings of those cases do not conflict with that of the D.C. Circuit here. The question at issue in *Barney* and *Dickerson* was simply whether the government adequately proved its Exemption 7(A) claim, not whether other exemption claims

---

[13] In *Barney*, the government raised, and the district court ruled on, claims under both Exemption 7(A) and Exemption 3, 618 F.2d at 1271, and the Eighth Circuit suggested that the same analysis, and the same degree of factual substantiation, could apply to both claims. *Id.* at 1274 n.15. In *Dickerson*, the government simultaneously raised claims under Exemption 7(A), 7(C), 7(D) and 7(E). *See* 992 F.2d at 1428; *id.* at 1434 (Beckwith, J., concurring) (noting that "the trial court considered each of the cited exemptions" and opining that "each of the four exemptions . . . supports the nondisclosure of some or all of the documents"). These cases are just some of the many examples in which the government raised an Exemption 7(A) simultaneously with other exemption claims. *See, e.g., Avondale Indus., Inc. v. NLRB*, 90 F.3d 955 (5th Cir. 1996); *Computer Prof'ls for Soc. Responsibility v. United States Secret Serv.*, 72 F.3d 897, 901-03 (D.C. Cir. 1996); *Manna v. DOJ*, 51 F.3d 1158 (3d Cir. 1995); *Marzen v. Department of Health & Human Servs.*, 825 F.2d 1148 (7th Cir. 1987); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980). Indeed, respondent has been unable to locate even a single case in which the government has contended that it could not raise other exemption claims without harming a criminal investigation or otherwise compromising its ability to rely on Exemption 7(A).

need be (or could have been) raised. And *Chilivis v. SEC* involved solely the question of whether the government waived exemption claims that were not presented in *its own* motion to dismiss or *its own* motion for summary judgment, even where such claims were presented later *in the original district court proceeding*. The Eleventh Circuit concluded that neither motion was a "responsive pleading" for purposes of Fed. R. Civ. P. 8(c) and that, accordingly, the government "had no obligation to raise all applicable affirmative defenses" in either motion. 673 F.2d at 1209. Because the government *did* raise all its exemption claims in the initial district court proceedings, the court had no occasion to even address the question presented to the D.C. Circuit: whether the failure to raise such claims in response to the *opposing party's* motion for summary judgment, or at any other point in the district court proceedings, precludes the government from raising such claims at a later time.

Finally, none of these cases suggests that Exemption 7(A) somehow relieves the government from having to even review all of the requested documents. The government's suggestion to the contrary relies on a misunderstanding of *Robbins Tire* that has been *rejected* by every court of appeals to have considered it. *See, e.g., Crancer v. DOJ*, 999 F.2d 1302, 1309-10 (8th Cir. 1993) (even where making a categorical showing of "interference," government "must conduct a document-by-document review"); *Bevis v. Department of State*, 801 F.2d 1386, 1389-90 (D.C. Cir. 1986) (agency following categorical approach "must conduct a document-by-document review in order to assign documents to the proper category"). The government's assumption that Exemption 7(A) allows the government to protect its entire investigatory file, without seriously reviewing the requested documents, is merely a variant of the "blanket exemption" concept that this Court has expressly foreclosed. *Robbins Tire*, 437 U.S. at 236

(Exemption 7(A) "was designed to eliminate 'blanket exemptions' for Government records simply because they were found in investigatory records compiled for law enforcement purposes . . . ."); *see also North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989) (R.B. Ginsburg, J.) ("Exemption 7(A) does not authorize automatic or wholesale withholding of records or information simply because the material is related to an enforcement proceeding."). The case law is unanimous that, regardless of what exemption claims the government ultimately asserts, the government actually must review the requested documents.

II. The Facts of this Case Do Not Present the Questions or Concerns Posited by the Government That Would Follow from Having to Raise Multiple Exemption Claims Simultaneously.

Lacking either a conflict among the Circuits or any inconsistency with this Court's decision in *Robbins Tire*, the petition ultimately falls back on an abstract belief that it is somehow unfair to expect the government, when it is in the midst of an active investigation or in the heat of a criminal trial, to defer resources and personnel from that active investigation or trial to root through individual documents in response to a FOIA request where Exemption 7(A) simply would protect all documents responsive to the request. Nothing in this case presents the concerns raised by the government.

First, the purported belief that the mere document-review effort could effect its own type of "interference" by deferring agency personnel and resources away from the pending investigation or trial to which the requested documents relate, (Pet. at 16), is misplaced. No such argument of "interference" was, or could be, presented *here*. (Pet. App. 14a, 18a.) The government has never asserted that Maydak's request was so broad that it would have been unduly burdensome to even

review the sought-after documents. More important, the government could not claim that the time and energy expended in reviewing such documents would have delayed, or deferred personnel away from, the enforcement proceedings or investigation against Maydak. He already had been tried and convicted. There was no investigation. This case, in short, is a closed, garden-variety criminal case, and does not involve the type of situation (if such a situation exists) where even responding to a FOIA request could amount to the type of "interference" contemplated by Exemption 7(A).[14]

Second, the assumption that any portions of the file would have been protected by Exemption 7(A) begs the very question that the government declined to have answered in this case: whether Exemption 7(A) continues to apply where the contemplated "proceeding" — here, a criminal trial — has occurred and is final, and where the only remaining litigation consists of collateral attacks to the outcome of that proceeding. It is far from obvious that the government would have been successful on that claim had it not withdrawn it. Specifically, the government has never explained why the types of "interference" with enforcement proceedings that this Court recognized in *Robbins Tire* — for example, tipping off potential targets of an ongoing investigation, or revealing the government's litigation strategy or the identity of the witnesses against a potential defendant, *see* 437 U.S. at 239-41 — remained likely once Maydak, the subject of the criminal

---

[14] The D.C. Circuit expressly recognized that certain "unusual situations" would require a departure from the normal rule that all exemption claims must be raised in the initial proceedings (Pet. App. 14a), and that it maintains the discretion under 28 U.S.C. § 2106 to remand a case where, for example, there is a basis for believing that "dire consequences will flow from the release of the requested documents" (Pet. App. 18a.). But it correctly held that this is not such a case.

investigation, was convicted, and thus necessarily learned the nature of the case against him, the adverse witnesses, and the government's litigation strategy, and certainly could not avoid the charges. Therefore, *this* case presents none of the concerns — "let[ting] the cat out of the investigative bag" (Pet. at 9, citation omitted); prematurely disclosing "the government's investigative and litigation strategies and witness identities" (Pet. at 13); revealing "to other subjects what evidence the government has (or does not have), and the scope and direction of its investigation" (Pet. at 17); or "disclosing detailed information that would help the [defendant] frustrate the government's case" (Pet. at 17) — on which the government's petition is based, and thus is an improper vehicle to raise them in the abstract.

In addition, nothing in the D.C. Circuit's opinion opens the door to these types of interference in *other* cases. The D.C. Circuit recognized that flexible, case-specific measures must be employed to ensure that an adequate factual foundation for an exemption claim is provided while avoiding requiring a level of proof of *any* exemption claim that would reveal information alleged to be protected by, or otherwise defeat the purpose of, any FOIA exemption. (Pet. App. 13a.)[15] Although the petitioner complains that the D.C. Circuit was "unable to offer any guidance on how the government was to perform the balancing act" of raising multiple exemption claims simultaneously (Pet. at 23), that question was not before the

---

[15] This recognition, which furthers Congress's intent to provide "workable rules" of FOIA disclosure, *Reporters Comm. for Freedom of Press*, 489 U.S. at 779 (citation omitted), is consistent with the D.C. Circuit's prior decisions and those of all other Circuits. *See, e.g., Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995); *Maynard v. CIA*, 986 F.2d 862, 866-68 (1st Cir. 1993); *Vaughn v. United States*, 936 F.2d 862, 867 (6th Cir. 1991).

D.C. Circuit, for, as discussed above, the government raised only an Exemption 7(A) in the district court, and had abandoned even that exemption claim on appeal. If in the future the government believes it is confronted with an unusual circumstance where asserting other exemption claims along with an Exemption 7(A) claim would compromise its Exemption 7(A) claim, nothing in the D.C. Circuit's opinion prevents the government from seeking a departure from the general rule requiring the government to raise its defenses in the initial proceedings. If it does not receive a departure, it may return to this Court with a concrete, rather than hypothetical, explanation for why it could not assert multiple exemption claims simultaneously. But *this* case involves no such circumstance.

III. There Is No Independent Need to Review the Government's Contention That the Requested Records May Have in Part Been Subject to Other FOIA Exemptions Had the Government Raised Such Exemptions.

Finally, the petition completely mischaracterizes the D.C. Circuit's opinion as ordering the production of "lawfully withheld" information, such as "grand jury materials" and materials that "implicate the privacy interests of third parties," simply "to punish the government for perceived missteps." (Pet. at 24.) This misreading of the D.C. Circuit's decision plainly does not raise any issue warranting plenary review. Nothing in the D.C. Circuit's opinion suggested that it was punishing the government. And the assumption that some information in the government's files may have been protected by other exemptions — and thus were "properly and lawfully" withheld (Pet. at 24) — is nothing more than a thinly veiled attempt to write out of the statute the government's burden of proof. FOIA presumes that *all* requested information is "unlawfully" withheld unless the government *proves* that such

information is subject to a valid exemption; it was this failure to present proof, and not the (still unknown) nature of the information itself, that renders the government's continued withholding improper.

The government does not allege any conflict among the Circuits on this issue. Moreover, contrary to the government's claim, there does not even exist any "tension" between the D.C. Circuit's decision here and the cases cited in the petition relating to the government's still-unsubstantiated assertion that the requested documents contain "confidential" or "personal" information about third parties. (Pet. at 27.) Each of the cited cases dealt with whether information that the government *proved* to be otherwise protected by Exemptions 6 or 7(C), 5 U.S.C. §§ 552(b)(6), 552(b)(7)(C) — *i.e.*, information in which a person has a reasonable expectation of privacy — automatically loses its protection because it was made publicly available in the past, either by the government, *see, e.g., Sherman v. United States Dep't of the Army*, 244 F.3d 357, 363-64 (5th Cir. 2001) (fact that Army has made public in past social security numbers of service personnel does not amount to "waiver" of Exemption 6 where government establishes that individuals' privacy interest in their social security numbers is substantial and that individuals themselves did not waive such interest), or by the person about whom such information pertains, *see, e.g., Massey v. FBI*, 3 F.3d 620, 624 (2d Cir. 1993) (Exemption 7(C) protection not necessarily lost "even where the information may have been public at one time").[16]

---

[16] *Irons v. FBI*, 880 F.2d 1446 (1st Cir. 1989) (en banc) (Breyer, J.), involved an interpretation of the "confidential source" exclusion found in Exemption 7(D), 5 U.S.C. § 552(b)(7)(D), not Exemptions 6 or 7(C). In any event, the court there applied principles analogous to those applied by the other cases cited in the petition — concluding that "public testimony by 'confidential sources' cannot 'waive' the FBI's right under the second clause

In other words, each case involves a situation where a FOIA requester seeks to rebut the government's *prima facie* showing that there is a substantial privacy interest in the information sought — not, as here, where the government simply failed to make any showing that any such privacy interest existed at all.

The claim that this case involves "grand jury materials" that may have been "otherwise protected" by Fed. R. Crim. P. 6(e), is similarly unworthy of this Court's review. The decisions the government cites recognize the fact-specific inquiry in claims seeking the disclosure of grand jury material. *See, e.g., Douglas Oil Co. v. Petrol Stops N.W.*, 441 U.S. 211, 219 (1979). Not only has the government never provided any basis for evaluating the material at issue in this case and the interests (if any) that would be compromised by its disclosure, this is a fact-bound question not warranting this Court's plenary review.

To be sure, the FOIA exemptions involve information that Congress decided need not be produced. But Congress also decided to impose on the government the burden of proving that these exemptions apply to the requested documents. The D.C. Circuit held merely that, where the government has not proved that requested records are exempt, it must disclose them and generally may not relitigate the case by asserting new, heretofore unraised, exemption claims. As discussed above, this conclusion broke no new ground, is consistent with the prior decisions of this Court, and is plainly correct.

---

of exemption 7(D) to withhold 'information furnished by a confidential source' and not actually revealed in public." *See* 880 F.2d at 1456-57. These principles are inapposite to the question resolved by the D.C. Circuit: whether the government, which has the initial burden of proving the applicability of an exemption, "waives" a claim to a particular exemption by not raising it in the district court proceedings.

CONCLUSION

The petition should be denied.

Respectfully Submitted,

DEANNE E. MAYNARD*
DAVID C. BELT
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

* Counsel of Record

June 1, 2001

Supreme Court, U.S.
FILED
JUN 14
OFFICE OF THE CLERK

No. 00-1507

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE,
PETITIONER

v.

KEITH MAYDAK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

Cases:	Page
American Friends Serv. Comm. v. *Webster*, 720 F.2d 29 (D.C. Cir. 1983)	3
Bonner v. *United States Dep't of Justice*, 928 F.2d 1148 (D.C. Cir. 1991)	7, 8
Douglas Oil Co. v. *Petrol Stops N.W.*, 441 U.S. 211 (1979)	3
FBI v. *Abramson*, 456 U.S. 615 (1982)	5
FTC v. *Grolier Inc.*, 462 U.S. 19 (1983)	4
Fund for Constitutional Gov't v. *National Archives & Records Serv.*, 656 F.2d 856 (D.C. Cir. 1981)	3
John Doe Agency v. *John Doe Corp.*, 493 U.S. 146 (1989)	4
Lesar v. *United States Dep't of Justice*, 636 F.2d 472 (D.C. Cir. 1980)	7
Mobil Oil Corp. v. *EPA*, 879 F.2d 698 (9th Cir. 1989)	9
NLRB v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978)	2, 5-6
Trans-Pac. Policing Agreement v. *United States Customs Serv.*, 177 F.3d 1022 (D.C. Cir. 1999)	8
United States Dep't of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)	4-5
United States Dep't of State v. *Washington Post Co.*, 456 U.S. 595 (1982)	5
Washington Post Co. v. *United States Dep't of Health & Human Servs.*, 795 F.2d 205 (D.C. Cir. 1986)	5

Statutes and rule: Page

Freedom of Information Act, 5 U.S.C. 552 (1994 & Supp. V 1999) 1
5 U.S.C. 552(b)(7)(A) ..... *passim*
5 U.S.C. 552(b)(7)(B) 5
5 U.S.C. 552(b)(7)(C) 5, 6
5 U.S.C. 552(b)(7)(D) 5, 6
Fed. R. Crim. P. 6(e) 2, 3

In the Supreme Court of the United States

No. 00-1507

UNITED STATES DEPARTMENT OF JUSTICE,
PETITIONER

v.

KEITH MAYDAK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent attempts to portray the court of appeals' decision in this case as a fact-specific application of pre-existing legal principles. That characterization is without basis. As the petition for certiorari explains, the court of appeals has announced a wholly new mode of procedure under the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1994 & Supp. V 1999), to govern the common situation in which documents the release of which might interfere with pending law enforcement proceedings (and which are therefore protected from compelled disclosure by FOIA Exemption 7(A), 5 U.S.C. 552(b)(7)(A)), are also covered by other FOIA exemptions. Other courts of appeals, in contrast to the D.C. Circuit, have permitted an agency to invoke other relevant exemptions through an individualized review process once law enforcement proceedings have terminated and Exemption 7(A) is no longer applicable. See Pet. 10-11.

The direct effect of the court's decision in this case alone is to compel the disclosure of more than 1000 pages of grand jury materials the release of which is expressly forbidden by

law—as well as, *inter alia*, information concerning the personal privacy interests of persons who furnished information to the government. More broadly, the legal regime adopted by the court of appeals, if allowed to stand, will seriously disrupt the orderly processing of future FOIA requests for similar documents, especially since any FOIA suit may be brought in the District of Columbia, where the decision below will be binding precedent. Indeed, as we have explained (Pet. 16-18), the court of appeals' decision is already having those consequences.

Those consequences are in no way compelled by general principles of FOIA law. To the contrary, as the petition for certiorari explains (at 12-15), this Court in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), emphasized that both the text and purposes of Exemption 7(A) support a "generic" or "categorical" approach under which specified classes of records may be withheld without document-specific proof of likely interference with enforcement proceedings. Far from comporting with established principles of FOIA law, the court of appeals' decision will substantially undermine the ability of agencies to invoke Exemption 7(A) in the manner contemplated by this Court. Review by this Court therefore is warranted.

A. Respondent's discussion (Br. in Opp. 17-22) substantially understates the deleterious practical effects—both case-specific and prospective—of the court of appeals' ruling.

1. The court of appeals' decision compels the release of grand jury materials, notwithstanding the express prohibition of Federal Rule of Criminal Procedure 6(e). See Pet. 24-27. The government's declarant in this case attested that the documents responsive to respondent's FOIA request included "[g]rand jury materials consisting of a large volume of subpoenas, transcripts, and subpoenaed documents." Pet. App. 36a. Respondent has not contested that assertion, and neither the district court nor the court of appeals suggested any reason for disbelieving it.

Respondent contends that this Court has "recognize[d] the fact-specific inquiry in claims seeking the disclosure of grand jury material." Br. in Opp. 22 (citing *Douglas Oil Co.* v. *Petrol Stops N.W.*, 441 U.S. 211, 219 (1979)). That proposition has no application here, however, because grand jury materials covered by Rule 6(e) are *categorically* protected from public disclosure under the FOIA. A "fact-specific inquiry" may indeed be necessary to determine whether a private party has made the particularized showing of need required to obtain grand jury materials under one of the exceptions to the general rule of nondisclosure in Rule 6(e) itself. See *Douglas Oil Co.*, 441 U.S. at 219-224; *id.* at 222 ("Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed."). It is settled law, however, that a plaintiff's desire to acquire agency records through the FOIA is not itself the sort of "need" that can support an exception to the general rule of grand jury secrecy. See *American Friends Serv. Comm.* v. *Webster*, 720 F.2d 29, 72 (D.C. Cir. 1983); *Fund for Constitutional Gov't* v. *National Archives & Records Serv.*, 656 F.2d 856, 868-869 (D.C. Cir. 1981). The court of appeals' decision compels the disclosure of grand jury materials under the FOIA, notwithstanding the fact that respondent could not possibly have established his entitlement to those documents if the case had been remanded for further proceedings in the district court.

2. The court of appeals' decision also threatens substantial future disruption of agency efforts to process FOIA requests for documents related to a pending law enforcement proceeding. See Pet. 16-18. Respondent is incorrect in contending (Br. in Opp. 19-20) that the court of appeals' approach is sufficiently flexible to protect the government's interests in Exemption 7(A) cases. Although the court

stated in conclusory terms that "the government has mechanisms by which it can accomplish the goal of protecting sensitive information while at the same time satisfying its burden of proof with respect to other exemptions in the original district court proceedings," Pet. App. 13a, it offered no meaningful guidance on how that task could be accomplished, see Pet. 22-23. Moreover, the sort of ad hoc submissions and *in camera* reviews the court apparently had in mind would constitute a sharp departure from the use of *Vaughn* indices and other settled practices in FOIA litigation. But even if suitable alternative mechanisms were available and readily identifiable in some cases, any such flexibility in the manner of demonstrating the applicability of other FOIA exemptions to a court would do nothing to address the second danger at which Exemption 7(A)'s categorical approach is directed—*i.e.*, that contemporaneous line-by-line processing of documents in response to a FOIA request will divert agency files and personnel from the conduct of the enforcement proceeding itself. See Pet. 14-15.

Finally, the vagaries of litigation are such that an agency confronted with a FOIA request for records currently protected by Exemption 7(A) will rarely be able to predict with confidence whether that exemption will remain applicable throughout the duration of any ensuing FOIA suit. The practical impact of the court of appeals' decision is therefore not limited to situations in which the underlying enforcement proceeding actually concludes during the pendency of the FOIA case. Rather, the decision will frustrate the ability of agencies to rely on the categorical approach endorsed in *Robbins Tire* with respect to *all* FOIA requests to which Exemption 7(A) potentially applies. The decision thus flouts the Court's repeated admonitions regarding the need for "workable rules" in the FOIA context. *FTC* v. *Grolier Inc.*, 462 U.S. 19, 28 (1983); see also, *e.g.*, *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 157 (1989); *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489

U.S. 749, 776-780 (1989); *FBI* v. *Abramson*, 456 U.S. 615, 623-629 (1982); *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 599-602 (1982).

B. Respondent suggests (Br. in Opp. 13) that general FOIA principles compel the result reached by the court of appeals, and that the government's position in this case must therefore rest on the view that Exemption 7(A) occupies a "preferential status." That argument is misconceived. Our contention is not that Exemption 7(A) is more important than other FOIA exemptions, but simply that its application (like that of other exemptions) is to be accomplished in a pragmatic way. In particular, implementation of Exemption 7(A) must take into account that exemption's particular *combination* of features—*i.e.*, that (1) it is suitable for broad and categorical application, (2) its applicability to particular documents is especially likely to change over time, and (3) it is typically invoked when a person involved in law enforcement proceedings turns to the FOIA in an effort to circumvent limitations on discovery in those proceedings, but may well abandon that effort once the proceedings are over. See Pet. 16.[1]

1. In upholding the use of a generic approach to Exemption 7(A), the Court in *Robbins Tire* specifically contrasted that exemption to Exemptions 7(B), 7(C), and 7(D). 437 U.S.

---

[1] Respondent relies on the proposition that in FOIA cases "the government ordinarily 'must raise all its claims of exemption in the original proceedings in district court, and may not thereafter assert new claims of exemption, either on appeal or on remand following appeal.'" Br. in Opp. 9 (quoting *Washington Post Co.* v. *United States Dep't of Health & Human Servs.*, 795 F.2d 205, 208 (D.C. Cir. 1986)). None of the cases that respondent cites in support of that proposition involved Exemption 7(A), and none addressed the situation presented here, where the government *prevailed* on its initial claim of exemption, but due to changed circumstances that exemption ceased to be applicable during the pendency of the litigation. Moreover, as we explain below (see pp. 9-10, *infra*), the government in this case *did* raise exemptions in addition to Exemption 7(A) with sufficient particularity in the district court. See also Pet. 18-21.

at 223-224. As we have explained (Pet. 14-15), the categorical approach to Exemption 7(A) serves both to prevent the premature disclosure of sensitive law enforcement information, and to ensure that the processing of FOIA requests does not divert government files and resources from the enforcement proceeding itself. As respondent observes (see Br. in Opp. 14 n.12), this Court has subsequently recognized that a categorical approach is sometimes also appropriate under Exemptions 7(C) and 7(D). But the fact that Exemption 7(A) is not "unique" in this respect does not detract from the importance of the objectives identified in *Robbins Tire*.

2. As the petition explains (at 2), Exemption 7(A) is temporally limited and applies to particular records only as long as a reasonable risk of interference with law enforcement persists. The situation presented in this case, where the agency determined during the pendency of the FOIA litigation that the prior danger of interference had dissipated, occurs with some frequency. The court of appeals recognized that an agency should be permitted to invoke additional exemptions at an advanced stage of a FOIA suit "where a substantial change in the factual context of the case * * * forces the government to invoke an exemption after the original district court proceedings have concluded." Pet. App. 14a. The court found that principle to be inapplicable here, however, on the ground that "the only change in this case is the simple resolution of other litigation, hardly an unforeseeable difference." *Id.* at 15a. Under that analysis, the culmination of the underlying enforcement proceeding (and the consequent inapplicability of Exemption 7(A) after that time) could *never* provide grounds for permitting the agency to invoke additional exemptions, since the eventual completion of a government enforcement proceeding will never be "unforeseeable."

The court of appeals' reasoning misses the point entirely. Precisely because the termination of law enforcement pro-

ceedings during the pendency of related FOIA litigation is a frequent and foreseeable occurrence, any workable approach to the implementation of Exemption 7(A) must take into account the exemption's temporally limited nature. As we explain above (see pp. 3-5, *supra*), the agency's practical ability to employ a categorical approach in establishing the applicability of Exemption 7(A) will be substantially negated if the agency is thereby deemed to have waived its right to prove other applicable exemptions in the event that Exemption 7(A) ceases to apply.

C. Respondent suggests (Br. in Opp. 6) that the government might have continued to rely on Exemption 7(A) throughout this litigation by invoking the principle that in FOIA cases, "court review properly focuses on the time the determination to withhold is made." *Bonner* v. *United States Dep't of State*, 928 F.2d 1148, 1152 (D.C. Cir. 1991); see also *Lesar* v. *United States Dep't of Justice*, 636 F.2d 472, 480 (D.C. Cir. 1980).[2] The fact that the government might have pursued that course, however, provides no support for the court of appeals' resolution of this case.

Under a strict application of the *Bonner* rule, the district court's judgment would have been affirmed in this case so

---

[2] Respondent also asserts (Br. in Opp. 6-7) that the government might have resisted a remand on the alternative ground that Exemption 7(A) remained applicable because respondent "still had several collateral motions pending and contemplated filing several more." Exemption 7(A) applies, however, only where the production of requested records "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A). In light of the Third Circuit's affirmance of the district court's denial of respondent's motion for a new trial (see Pet. App. 6a-7a, 15a), the Department of Justice concluded that the prospect of interference with any present or future enforcement proceeding was sufficiently remote that reliance on Exemption 7(A) was no longer appropriate. Whether or not the government might tenably have pursued a more aggressive course with respect to Exemption 7(A), the government's actual conduct was surely a reasonable means of implementing the statutory standard.

long as the court of appeals agreed that the pertinent documents were covered by Exemption 7(A) at the time of withholding, even if all relevant enforcement proceedings had concluded during the pendency of the FOIA suit. Respondent's only remedy at that point would have been to file a new FOIA request, subject to the potential administrative and judicial delays that such a course would entail. See *Bonner*, 928 F.2d at 1153 ("Bonner may indeed file a new FOIA request, but if he does, he will stand in line behind other FOIA requesters."). And if respondent were to file a second lawsuit challenging the agency's withholding decision, the government could, of course, raise any applicable exemption, including exemptions not raised in the earlier suit.

As a matter of policy, the government has not advocated a strict application of the *Bonner* rule in the context of Exemption 7(A). Because of the temporally limited nature of Exemption 7(A), situations will frequently arise in which the release of documents that were properly withheld under that exemption as an initial matter ceases, during the pendency of the FOIA litigation, to present a realistic danger of interference with any underlying enforcement proceeding. Forcing the courts to resolve the Exemption 7(A) issue even though the law enforcement proceeding has terminated—and then forcing the plaintiff to file a new FOIA request (and potentially a new lawsuit) under those circumstances—would result in wasted efforts by the FOIA requester, the government, and the courts. In moving for a remand in the present case, the government sought to avoid those inefficiencies. Cf. *Trans-Pac. Policing Agreement* v. *United States Customs Serv.*, 177 F.3d 1022, 1028 (D.C. Cir. 1999). In practical effect, the government's position was that the district court on remand should adjudicate the case *as though* respondent had filed a new FOIA request after the prospect of interference with law enforcement proceedings had dissipated, and that any disputes arising out of that

(hypothetical) request should be resolved within the framework of the existing case.

By opposing a remand to allow the district court to rule on the applicability of other FOIA exemptions, respondent seeks to obtain the advantages of that procedure without accepting the disadvantages. As we explain above, if two sequential FOIA requests and two sequential lawsuits had actually been filed, the government, in defending against the second suit, would have been entitled to invoke all applicable FOIA exemptions, including exemptions that had not been raised in the earlier litigation. Because the purpose of the remand is to allow the case to proceed as though a second request had been filed, the government should not be disadvantaged by its willingness to accommodate the FOIA requester so as to expedite the ultimate resolution of the dispute. Cf. *Mobil Oil Corp.* v. *EPA*, 879 F.2d 698, 701 (9th Cir. 1989) (courts should hesitate to conclude that an agency's voluntary release of particular records waives FOIA exemptions as to related documents, because "[i]mplying such a waiver could tend to inhibit agencies from making any disclosures other than those explicitly required by law").

D. Respondent repeatedly states (Br. in Opp. 1, 2, 4, 12, 16) that the government did not "raise" any FOIA exemption other than Exemption 7(A) in the initial district court proceedings. With respect to additional exemptions, the agency did not perform the sort of page-by-page analysis, including the segregation of disclosable from nondisclosable material, that it would have undertaken if it had not regarded Exemption 7(A) as an independently sufficient ground for withholding.[3] The government's district court

---

[3] Contrary to respondent's suggestion (Br. in Opp. 16), the record makes clear that the government did "review all of the requested documents" in this case. See Pet. App. 36a (Hull Declaration explains that the agency "conducted a document-by-document review of the documents pertaining to [respondent] and categorized them").

filings stated unequivocally, however, that substantial portions of the requested materials would be protected from compelled disclosure on grounds other than Exemption 7(A), and that the agency's primary reliance on Exemption 7(A) should not be construed as a waiver of other exemptions. See, *e.g.*, Pet. App. 45a (Hull Declaration); Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment 18-20 (Nov. 17, 1997); Reply Memorandum to Plaintiff's Opposition to Defendant's Motion for Summary Judgment 15-17 (Jan. 2, 1998).

Under those circumstances, respondent cannot plausibly claim that the agency's request for a remand to consider the very exemptions it had previously identified in the district court reflects governmental sandbagging or subjects him to unfair surprise. And as the petition explains (at 18-21), under traditional summary judgment principles, the government's district court filings created a genuine issue of material fact regarding the applicability of exemptions other than Exemption 7(A) to the documents at issue here. The existence of that factual dispute alone should have precluded the court of appeals from ordering disclosure of all responsive documents.

* * * * *

For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JUNE 2001